Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

MISSOURI RIVER SERVICES, INC.,

Petitioner,

v.

OMAHA TRIBE OF NEBRASKA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a court may vacate an arbitration award which satisfies all criteria set forth in the Federal Arbitration Act but (assertedly) violates extra-statutory requirements imposed by the court?

2. Whether a Federal Court to which an arbitration award has been submitted for confirmation may independently determine a question possessing jurisdictional implications where the jurisdictional question is inextricably intertwined with the merits of the case and necessarily was resolved by the arbitrator?

PARTIES TO THE PROCEEDING

The following entities were parties to the proceeding before the United States Court of Appeals for the Eighth Circuit:

Petitioner: Missouri River Services, Inc.

Respondent: The Omaha Tribe of Nebraska, a federally recognized Indian Tribe.

RULE 29.6 STATEMENT

Missouri River Services, Inc. hereby discloses that it is a Delaware corporation, has no parent corporation, and no publically held corporation owns 10% or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

Missouri Rivers Services, Inc. respectfully petitions this Court for a Writ of Certiorari to review the decision of the United States Court Appeals for the Eighth Circuit ("Eighth Circuit"), entered in this proceeding on September 12, 2001, in order to resolve a direct conflict between this decision and the decisions of multiple other Circuits on the important federal questions presented herein.

OPINIONS BELOW

The Opinion of the Eighth Circuit which gives rise to this Petition is reported at 267 F.3d 848 and is printed in the Appendix at App. 1a through App. 14a. The Order of the Eighth Circuit, dated November 5, 2001, which denied Missouri River Services, Inc.'s Petition for Rehearing and Rehearing En Banc, is reprinted in the Appendix at App. 49a. The Memorandum Opinion of the United States District Court for the District of Nebraska, dated November 17, 1999, which confirmed the Award of Arbitrator but subsequently was reversed by the Eighth Circuit, is reprinted in the Appendix at App. 15a through App. 30a. A previous Memorandum Opinion of the United States District Court for the District of Nebraska, which contains a discussion of the background of the case incorporated by reference into the District Court's November 17, 1999 Memorandum Opinion, is reprinted in the Appendix at App. 31a through App. 45a. The Award of Arbitrator, which the Eighth Circuit vacated by

its decision, is reprinted in the Appendix at App. 50a through App. 57a.

JURISDICTION

The Opinion of the Eighth Circuit is dated September 12, 2001. The Order denying Missouri River Services, Inc.'s Petition for Rehearing and Rehearing En Banc is dated November 5, 2001. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The lower courts possessed subject matter jurisdiction pursuant to the Federal Question Statute, 28 U.S.C. § 1331.

STATUTES INVOLVED IN THE CASE

Section 9 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 9, states in relevant part:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at anytime within one year after the award is made, any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such award unless the award is vacated, modified, or corrected as prescribed in Sections 10 and 11 on this Title.

Section 10 of the FAA, 9 U.S.C. § 10(a), states in relevant part:

In any of the following cases, the United States Court, in and for the District wherein the award was made may make an order vacating the award upon the application of any party to the arbitration –

(1) where the award was procured by corruption, fraud, or undue means.

(2) where there was evident partiality or corruption in the arbitrators, or either of them.

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

STATEMENT OF THE CASE

A. Summary of the Case

This case comes to this Court following a four and one-half year arbitration proceeding. This arbitration included no fewer than ten days of hearing during which arbitrator Melinda M. Harper considered thousands of pages of testimony and written exhibits.

Following the conclusion of the evidence, the parties submitted both written and oral closing arguments. The

arbitrator took the matter under submission, and ultimately issued a written award directing Respondent, the Omaha Tribe of Nebraska ("Tribe"), to pay Petitioner, Missouri River Services, Inc. ("MRS"), the sum of $6,384,435.00, plus interest at the rate of eight percent, compounded annually.

MRS thereupon submitted this award to the United States District Court for the District of Nebraska for confirmation. The District Court, acting through Senior District Judge Lyle E. Strom, correctly concluded that it was not empowered to review the merits of the arbitrator's decision, and confirmed the award.

The Tribe appealed this judgment to the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit"). The Eighth Circuit proceeded to do what Judge Strom said he could not do, and reviewed the merits of the arbitrator's decision. Based on its own view of the merits of the dispute between the parties, and relying solely upon the "cold" record before it, the Eighth Circuit vacated the arbitrator's award.

As the Court has enunciated on many occasions, the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"), establishes a liberal federal policy in favor of enforcing agreements to arbitrate. The Eighth Circuit's decision threatens the integrity of the arbitral process, and with it the attainment of this policy objective, by opening up arbitration awards to judicial second-guessing and extended litigation. Moreover, the Eighth Circuit's decision conflicts with the rulings of other United States Courts of Appeals and this Court in two critical ways.

First, under the case law of the Second, Fifth, Seventh, and Ninth Circuits, a court may vacate an arbitration award only upon a showing that one of the grounds listed in the FAA is present. This Court's recent jurisprudence also supports this result. The Eighth Circuit, however, ruled that a court also may vacate an award based upon extra-statutory grounds, and proceeded to do just that. As a result of this conflict, litigants will be faced with the intolerable circumstance of seeking to enforce arbitration awards in a system where the finality and effect of those awards depends upon the forum chosen.

Second, the case law of the Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits establishes that where a question possessing jurisdictional implications is intertwined with the merits of a case, the jurisdictional question should be regarded as an attack on the merits of the case and resolved accordingly. The Eighth Circuit also appeared to agree with the holding, at least prior to the instant case. In the instant case, the Eighth Circuit identified a jurisdictional question: whether the Tribe's waiver of its tribal sovereign immunity was broad enough to permit the relief awarded by that arbitrator. This question was closely intertwined with the merits of the case. Yet, the Eighth Circuit chose to overlook the arbitrator's decision and resolve the question based upon its own analysis and views. This result threatens to significantly erode the Congressional policy of enforcing agreements to arbitrate by enabling the losing party to seek indirect review of the merits of the case under the guise of raising jurisdictional questions.

B. The Agreement

On December 10, 1987, MRS and the Tribe executed an Agreement ("Agreement").[1] (App. at 61-63). The purpose of this Agreement was to provide for the operation of "highstakes bingo and other gaming activities, as well as complimentary [*sic*] businesses" on the Tribe's reservation. (App. at 61).

The Agreement set forth detailed provisions for the resolution of disputes between the parties. The Agreement first required that all disputes which could not be resolved amicably be submitted to arbitration:

> In the event any controversy or claim arising out of this Agreement cannot be settled by the parties hereto, such controversy or claim shall be settled by binding arbitration in accordance with the then current rules of the American Arbitration Association.

(App. at 62).

The Agreement then waived the Tribe's immunity from suit as follows:

> Owner [the Tribe] hereby waives its sovereign immunity from suit with respect to any dispute arising under this Agreement, but only to the extent of all real and personal property purchased pursuant to this Agreement, and Owner further agrees that judgment upon any arbitration award may be entered in any court having

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[1] MRS was known as Streicher & Stearns, Inc. at this time. The Agreement is excerpted in the Appendix due to its length and the fact that many of its provisions are not germane to the issues raised in this Petition.

> jurisdiction thereof, and that such court's judgment may result in an executable lien being placed on any such property. Any monetary judgment or award may be satisfied only out of such property and/or out of Owner's share of any future NOP [Net Operating Profits] under this Agreement.

(App. at 62-63).

The Agreement further specified that MRS would retain its rights under the Agreement for so long as was necessary for MRS to satisfy any award or judgment out of Net Operating Profits:

> [MRS] and [the Tribe] agree that this Agreement will remain in full force and effect throughout any such binding arbitration or court proceeding(s) and, further, that this Agreement shall continue in effect for so long as it is required for [MRS] to satisfy such judgment, if any, in addition to any other amounts due and payable under this Agreement, out of NOP.

(App. at 63).

Thus, the Agreement specified that MRS could execute against the profits of the gaming operation, even where MRS' relationship with the Tribe had entirely ceased.

MRS performed is obligations under this Agreement in full. The Tribe, however, expelled MRS from the reservation and subsequently contracted with another

company to build and operate the casino. This casino was constructed near the town of Onawa, Iowa.[2]

C. The Arbitration and Related Judicial Proceedings

On January 30, 1995, MRS filed a Demand for Arbitration with the American Arbitration Association ("AAA"). On March 24, 1995, the Tribe responded to this Demand for Arbitration. (App. at 33).

Preparations for the arbitration then commenced. A site for the arbitration was selected, an arbitrator was chosen, and correspondence and discovery materials were exchanged. (App. at 33).

On February 1, 1996, the orderly resolution of this case took what the United States District Court for the District of Nebraska described as a "tortuous course." (App. at 34). On that date, the Tribe filed a complaint for declaratory relief, injunctive relief, and monetary damages against MRS in its Tribal Court. In this complaint, the Tribe sought to prohibit MRS from participating in the arbitration. The Tribe further asserted as claims for relief each of the counterclaims it previously had filed against MRS in the arbitration. (App. at 34).

Extensive litigation in the Tribal Court, the District Court for Thurston County, Nebraska, and the United

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[2] The Tribe disputed these factual matters in the arbitration proceeding. The arbitrator evidently resolved these disputed factual matters in MRS' favor. Because this Petition for Certiorari does not concern the merits of the dispute between the parties, these factual matters will not be discussed further herein.

States District Court for the District of Nebraska resulted. (App. at 34-38). The United States District Court for the District of Nebraska ultimately issued an order enjoining the Tribe from proceeding with its extraneous litigation against MRS and directed the parties to return to arbitration. (App. at 44-45).

During the course of this litigation, the Tribe questioned whether all claims pending in the arbitration proceeding were subject to arbitration. (App. at 42-43). The United States District Court set a hearing for the purpose of resolving this issue. (App. at 46). The parties subsequently submitted a Stipulation to the District Court. Pursuant to this Stipulation, the parties confirmed that each claim filed by each party in the arbitration was subject to arbitration. (App. at 58-59). On March 4, 1998, the District Court entered an Order approving this Stipulation. (App. at 47-48). This Order established beyond cavil that the arbitrator possessed authority to resolve each claim before her.

The arbitration proceeding continued. Following a total of 10 days of evidentiary hearings and the submission of both written and oral closing arguments, the arbitrator issued her award.

D. The Award of the Arbitrator

On May 12, 1999, the AAA forwarded the Award of Arbitrator to the parties. In this Award, the arbitrator granted one claim for relief filed by MRS and denied the other. (App. at 51). The arbitrator further granted the Tribe an offset for a settlement paid to a third party (App. at 51), and denied the counterclaims filed by the Tribe.

(App. at 52-56). The net result was an order directing the Tribe to pay MRS the sum of $6,384,435.00, plus interest. (App. at 56). The Award specified that this sum was to be "paid from the Enterprise, which includes all gaming operations on the reservation of the Omaha Tribe of Nebraska (the Property), including specifically the gaming operation at Onawa, Iowa; or from any other funds the Respondent may elect to use." (App. at 51).

E. The Confirmation of the Arbitrator's Award

MRS moved the United States District Court for the District of Nebraska for an order confirming the Award of Arbitrator, and the Tribe moved to vacate the award. (App. at 15). The District Court heard argument on the matter and, on November 17, 1999, issued a Memorandum Opinion.

In this Memorandum Opinion, the District Court concluded it possessed federal question jurisdiction of the dispute between the parties. (App. at 20). The District Court noted that a court's review of an arbitrator's award is "extremely limited." (App. at 22). The Court further noted that under FAA a court may vacate an award only upon a showing that one of four narrowly defined statutory criteria are present in the case. (App. at 22-23).

The Tribe raised only one of these criteria – the allegation that the arbitrator had exceeded her authority – as grounds for opposing the award. (App. at 23). With respect to this allegation, the Court noted that the arbitrator's decision was based upon a lengthy hearing, with numerous exhibits. (App. at 25). The Court further noted

that the arbitrator was required to interpret the Agreement, "which is, at best, ambiguous, including interpretation of the terms 'property' and 'enterprise.' " (App. at 25). The Court correctly concluded that it was not empowered to examine the merits of the arbitrator's decision. (App. at 25). Thus, the Court declined to rule that the arbitrator had exceeded her authority in fashioning the relief set forth in the award.

The District Court also noted that the Eighth Circuit had established other judicially-created criteria for review of arbitration awards. The District Court concluded that the Award of Arbitration satisfied all such criteria. (App. at 27-29).

With regard to the scope of the Tribe's waiver of its tribal sovereign immunity, the Court noted that the Tribe had stipulated that the interpretation of the limitations on this waiver was subject to arbitration, and that the Court entered an order in accordance therewith. (App. at 25). As a result, the Court determined that deference to this aspect of the arbitrator's decision was appropriate. (App. at 25-26).

F. The Decision of the Court of Appeals

The Tribe appealed the District Court's judgment to the Eighth Circuit. The Eighth Circuit heard oral argument and, on September 12, 2001, issued its opinion. *Missouri River Services, Inc. v. Omaha Tribe of Nebraska*, 267 F.3d 848 (8th Cir. 2001) (App. at 1-14).

In this opinion, the Eighth Circuit reversed the judgment of the District Court and struck down the Award of

Arbitrator for two reasons. First, the Court determined that the Tribe's waiver of its immunity was not broad enough to permit MRS to execute against the Onawa, Iowa gaming operation, as authorized by the arbitrator. *Missouri River Services, Inc. v. Omaha Tribe of Nebraska*, 267 F.3d at 852-854 (App. at 6-11). The Court specifically ruled that deference to the arbitrator's determination of the same issue was not appropriate because the answer to this question affected the Court's jurisdiction. *Id.* at 852 (App. at 6). ("Because a waiver from suit implicates jurisdictional concerns, a court must satisfy itself that jurisdiction exists").

Second, the Eighth Circuit directly reviewed the merits of the arbitration award. The Eighth Circuit noted that an arbitration award may be set aside based upon the statutory criteria set forth in the FAA. *Id.* at 854-855 (App. at 12-14). The Eighth Circuit further stated that an award may be set aside based upon extra-statutory, judge-made criteria. *Id.* at 854-855 (App. at 12) (stating that an award may be set aside where it fails to draw its essence from the parties' agreement or evidences a manifest disregard for the law). Based upon its own analysis of the merits of the case, and relying completely upon the "cold" record before it, the Eighth Circuit concluded that the Award of Arbitrator failed to draw its "essence" from the Agreement. More specifically, the Eighth Circuit asserted that the Agreement unambiguously barred MRS from executing against the Onawa, Iowa gaming operation. *Id.* at 855. (App. at 13-14).

MRS strongly disagrees with the Eighth Circuit's construction of the Agreement between the parties. As the

District Court correctly noted, this Agreement is ambiguous. *See* discussion *supra* at Part E. MRS believes that the evidence submitted in the arbitration proceeding convincingly demonstrated that the Agreement was broad enough to permit the relief afforded by the arbitrator. The arbitrator evidently reached the same conclusion. The Eighth Circuit, which was unable to take the measure of the witnesses and had access only to a "cold" record, was not well positioned to reassess this conclusion.

The subject of this Petition, however, does not concern the relative merits of the decisions of the arbitrator and the Eighth Circuit. The issue is the authority of the courts to second-guess the arbitrator's resolution of the matter before her. Accordingly, these factual matters will not be discussed further herein.

REASONS FOR GRANTING THE PETITION

MRS respectfully submits that this Court should grant this petition for three reasons:

1. First, the case law of the Second, Fifth, Seventh, and Ninth Circuits holds that a court must affirm an arbitration award which satisfies all criteria set forth in the FAA, and may not impose additional, extra-statutory requirements. This rule accords with the standard principles of statutory construction set forth by this Court on many occasions. Yet, in the instant case the Eighth Circuit ruled that in addition to the statutory criteria, MRS' arbitration award had to satisfy additional, judge-made standards, and based on these additional requirements, struck down the award.

This case presents the Court an opportunity to establish uniform standards for the review of arbitration awards and eliminate the unnecessary confusion which currently besets this important area of the law. This case further offers the Court an opportunity to affirm the favored status of arbitration under federal law and provide parties to arbitration agreements with greater certainty that disputes will be resolved with the economy and efficiency which arbitration is intended to provide.

2. Second, the conflict between circuits highlights uncertainty in the application of this Court's precedents. The notion that a court may strike down an arbitration award which satisfies all criteria set forth in the FAA but (assertedly) violates non-statutory requirements emanates largely from dicta set forth in this Court's decision in *Wilko v. Swan*, 346 U.S. 427 (1953). The Court first criticized this decision for its mistrust of arbitration, and then overruled it, in two subsequent cases. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). Due to these subsequent cases, considerable uncertainty now exists as to what, if any, continuing force the *Wilko* formula possesses. This Court should grant the Petition to resolve this important question.

3. Third, cases from the Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits hold that where a question possessing jurisdictional implications is intertwined with the merits of the case, the jurisdictional question should be regarded as an attack on the merits and resolved accordingly. In the instant case, the Eighth Circuit identified a jurisdictional question in its opinion: whether the Tribe's waiver of its sovereign immunity was broad enough to permit

the relief awarded by the arbitrator. The arbitrator necessarily resolved this question when she issued her award. Yet, the Eighth Circuit chose to overlook the arbitrator's decision and independently resolve this question based upon its own analysis and views.

This case offers the Court an opportunity to ensure uniformity on this important issue. This case further offers the Court an opportunity to affirm the favored status of arbitration under federal law and establish that arbitration awards may not be second-guessed on the merits through the indirect means of reviewing federal jurisdictional questions.

I. This Court Should Grant This Petition Because The Eighth Circuit Erroneously Ruled That A Court May Vacate An Arbitration Award Which Satisfies All Criteria Set Forth In The FAA But (Assertedly) Violates Extra-Statutory Requirements Imposed By The Court, And This Ruling Conflicts With The Decisions Of Other Circuits.

A. This Court Should Grant This Petition Because The Eighth Circuit's Ruling Conflicts With The Decisions Of Other Circuits.

Judicial review of arbitration awards under the Federal Arbitration Act is strictly limited. The FAA states that an award may be vacated under the following circumstances:

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a).

In cases where none of these circumstances are present, the court must confirm the award. *Id.* at § 9.

Under the case law of the Second, Fifth, Seventh, and Ninth Circuits, a court may vacate an arbitration award only upon a showing that one of the grounds listed in the FAA is present. *Rocket Jewelry Box, Inc. v. Rocket Gift Packaging, Inc.*, 157 F.2d 174, 175 (2d Cir. 1998) (per curiam) ("Unless the party opposing confirmation can show a statutory basis for vacating, modifying, or correcting the award, the award must be confirmed."); *Wall Street Associates, L.P. v. Becker Paribas, Inc.*, 27 F.3d 845, 849 (2d Cir. 1994) ("Under the FAA, the validity of an award is subject to attack only on those grounds listed in § 10, and the policy of the FAA requires that the award be enforced unless one of those grounds is affirmatively shown to exist"); *Gulf Coast Industrial Workers Union v. Exxon Company, USA*, 70 F.3d 847, 850 (5th Cir. 1995) ("Under the Federal Arbitration Act . . . we can only disturb an arbitration award on the grounds set out in that Act");

Baravati v. Josepthal, Lyon & Ross, Inc., 28 F.3d 704, 706 (7th Cir. 1994) ("There is enough confusion in the law. The grounds for setting aside arbitration awards are exhaustively stated in the statute."); *Mosely, Hallgarten, Estabrook & Weeden v. Ellis*, 849 F.2d 264, 267 (7th Cir. 1988) ("Sections 10 and 11 of the Act set forth the exclusive grounds for vacating or modifying a commercial arbitration award."); *Lapine Technology Corp. v. Kyocera Corp.*, 130 F.3d 884, 889 (9th Cir. 1997) ("Federal courts can expand their review of an arbitration award beyond the FAA's grounds when (but only to the extent that) the parties have so agreed"). A panel of the Eighth Circuit, in a case decided prior to the instant proceeding, also endorsed this rule. *DVC-JPW Investors v. Gershman*, 5 F.3d 1172, 1174 (8th Cir. 1993), *reh'g denied* ("Under this Act, federal courts play a limited role in reviewing the decisions of arbitrators and a district court may only vacate arbitration decisions under the narrow set of circumstances set forth in the statute.").

This result is consistent with the rules of statutory construction endorsed by this Court on many occasions. In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992); *Demarest v. Manspeaker*, 498 U.S. 184 (1991). Further, under the canon *expresio unius est exclusio alterius*, where Congress sets forth exceptions to a rule in the statutory language, the proper inference is that Congress considered the issue of exceptions and limited the statute to the ones set forth. *United States v. Johnson*, 529

U.S. 53 (2000). Both of these well-established maxims of construction support the conclusion that a court charged with reviewing an arbitration award must confirm the award unless one of the exceptions set forth in the text of the statute is applicable.

The Eighth Circuit disregarded these limits on its discretion. The Eighth Circuit asserted that it was entitled to strike down the award based upon additional, judge-made criteria. The Eighth Circuit proceeded to engage in its own analysis of the merits of the parties' dispute. Based upon this analysis, the Eighth Circuit concluded that the arbitration had erred in her resolution of the issues. (App. at 13-14). The Eighth Circuit took this action even though the parties had stipulated that the arbitrator possessed authority to resolve these issues. In so doing, the Eighth Circuit contradicted both the plain language of the FAA and the authorities cited above.

It is conceded that not every circuit follows the rule enunciated above. In addition to the previous decisions of the Eighth Circuit cited by the Eighth Circuit in its opinion, the case law of the First and Eleventh Circuits supports the imposition of limited non-statutory review of the merits of an arbitrator's decision. *Bull HN Information Systems, Inc. v. Hutson*, 229 F.3d 321, 330-331 (1st Cir. 2001) ("Essentially, arbitral awards are subject to review where an award is contrary to the plain language of the contract and instances where it is clear from the record that the arbitrator recognized the applicable law – and then ignored it") (internal citations and quotations omitted); *Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 779 (11th Cir. 1993) (holding that award may be vacated if

it is "arbitrary and capricious" or contrary to public policy).

The case law of other circuits represents yet another approach. Under the law of these circuits, the grounds for vacating an arbitration award are not strictly limited to the circumstances set forth in the statute. At the same time, it is unclear whether these circuits would permit a court to engage in the relatively broad second-guessing of the merits of a decision which the Eighth Circuit indulged in the instant case. *See ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1463 (10th Cir. 1995) (holding that "an arbitrator's erroneous interpretations or applications of law are not reversible" and stating that an arbitrator's decision may be overturned only for 'willful inattentiveness to the governing law' "); *Apex Plumbing Supply Co. v. U.S. Supply Co.*, 142 F.3d 188, 193-194 (4th Cir. 1998) (authorizing limited non-statutory review but ruling that even an arbitration decision which disregards an unambiguous contract provision in favor of a conclusion supported by the record as a whole is not subject to judicial second-guessing).

This split between the circuits is precisely why this Court should review this case. *See* S.Ct. Rule 10(a) (stating that the Court may grant review where a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important question). This conclusion further is buttressed by the policy considerations underlying the FAA. The "unmistakably clear" purpose of the FAA is to ensure that the arbitration procedure, when selected by the parties to a contract, be "speedy and not subject to delay and obstruction in the courts." *Prima*

Paint Corp. v. Flood & Conklin Mfg., Co., 388 U.S. 395, 404 (1967). This act was designed to enable parties to avoid the "costliness and delays of litigation." *Scherk v. Alberto – Culver Co.*, 417 U.S. 506, 511-512 (1974), *reh'g denied*, 419 U.S. 885 (1974) (*quoting* H.R. Rep. No. 96, 68th Cong., 1st Sess. 2 (1924)).

The judicial second-guessing engaged in by the Eighth Circuit undermines this policy objective by encouraging parties to re-argue the merits of an arbitration to the courts. The instant case provides an apt illustration of the problem. After a four and one-half year arbitration proceeding, two and one-half more years of litigation took place before the Eighth Circuit issued its opinion. The end result was that MRS was stripped of its arbitration award, rendering the entire process nugatory. This result came despite the fact that the parties stipulated that the arbitrator possessed authority to resolve all claims before her. The Court should not allow this frustration of the congressional purpose of the FAA to continue.

The significance of this problem is exacerbated by the possibility of forum-shopping. The FAA states that an action to confirm or vacate an arbitration award "may" be brought in the United States District Court within whose territorial jurisdiction the award was made. 9 U.S.C. § 9-10. In keeping with this language, the weight of the authority holds that this provision is permissive, not mandatory. *E.g., Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698, 706 (2d Cir. 1985), *cert. denied*, 475 U.S. 1067 (1986); *In Re VMS Securities Litigation*, 21 F.3d 139, 145 (7th Cir. 1994); *Apex Plumbing Supply Co. v. U.S. Supply Co.*, 142 F.3d 188, 191-192 (4th Cir. 1998). *Contra, Sunshine*

Beauty Supplies, Inc. v. District Court, 872 F.2d 310, 312 (9th Cir. 1989).

The standard of review to be applied to an arbitration award is one of the most important questions that can arise under the FAA. This Court should accept the opportunity provided by this case to resolve the ongoing split between circuits on this issue. The depth of this split and the absence of any trend toward a single answer makes it evident that the Courts of Appeals are not likely to resolve this issue without direction from this Court. Action by this Court is imperative.

B. This Conflict Between Circuits Highlights Uncertainty In The Application Of This Court's Precedents.

The notion that a court may strike down an arbitration award which satisfies all criteria set forth in the FAA but (assertedly) violates non-statutory, judge-made criteria emanates largely from dicta appearing in this Court's decision in *Wilko v. Swan*, 346 U.S. 427 (1953). The Court criticized this decision for its mistrust of arbitration, and then overruled it, in two subsequent cases. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). Due to these subsequent cases, considerable uncertainty now exists as to what, if any, continuing validity the *Wilko* formula possesses. This Court should grant this Petition to resolve this important question.

In *Wilko*, the question was whether claims under the Securities and Exchange Act were subject to arbitration. The Court expressed considerable ambivalence toward

arbitration in its analysis of this question. The Court concluded that in view of these drawbacks to arbitration, securities acts claims were not subject to arbitration. *Id.* at 437.

In the course of expressing this ambivalence regarding arbitration, the *Wilko* Court stated that a failure of the arbitrators to decide in accordance with the provisions of the Securities Act could constitute grounds for vacating the award if that failure was made clearly to appear. The Court termed that such a failure "manifests disregard" of the law. *Id.* at 436.

In a perceptive opinion, the United States Court of Appeals for the Tenth Circuit noted that the courts subsequently had employed various verbal formulas encapsulating the notion of reviewing the merits set forth in this dictum. *Jenkins v. Prudential-Bache Securities, Inc.*, 847 F.2d 631, 634 (10th Cir. 1988). Included among these formulas was the requirement that the award draw its "essence" from the contract. *Id.* This was the very formula which the Eighth Circuit used to vacate the arbitration award in the instant case. *Missouri River Services, Inc. v. Omaha Tribe of Nebraska*, 267 F.3d 848, 855 (8th Cir. 2001) (App. at 13).

This Court subsequently criticized *Wilko* and the general suspicion of arbitration expressed therein: "it is difficult to reconcile *Wilko's* distrust of the arbitral process with this Court's subsequent decisions involving the Arbitration Act." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 231 (1987). Two years later, the Court overruled *Wilko*, albeit on grounds not at issue on

the instant case. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 485 (1989).

This action places the continuing viability of *Wilko's dicta* regarding the substantive review of arbitration awards into question. In 1994, the United States Court of Appeals for the Seventh Circuit directly addressed this issue. The Seventh Circuit, speaking through Judge Posner, first criticized *Wilko* as inconsistent with current Supreme Court decisions: "created *ex nihilo* to be a non-statutory ground for sitting aside arbitral awards, the *Wilko* formula reflects precisely that mistrust of arbitration for which the Court in its two *Shearson/American* opinions criticized *Wilko*." *Baravati v. Josepthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7th Cir. 1994). Judge Posner further stated in persuasive terms:

> We can understand neither the need for the formula nor the role that it plays in judicial review of arbitration (we suspect none – that it is just words). If it was meant to smuggle review for clear error in by the back door, it is inconsistent with the entire modern law of arbitration. If it is intended to be synonymous with the statutory formula that it most nearly resembles – whether the arbitrators "exceeded their powers" – it is superfluous and confusing. There is enough confusion in the law. The grounds for setting aside arbitration awards are exhaustively stated in the statute. Now that *Wilko* is history, there is no reason to continue to echo its gratuitous attempt at nonstatutory supplementation.

Id.

MRS submits that Judge Posner was correct in stating that there is enough confusion in the law. The Seventh

Circuit, however, is just one circuit among many. Only this Court can resolve the current confusion on this important issue. MRS respectfully submits that the Court should accept this opportunity to complete this task.

II. This Court Should Grant This Petition Because The Eighth Circuit Erroneously Ruled That Where A Question Possessing Jurisdictional Implications Is Intertwined With The Merits Of An Arbitration Decision, A Federal District Court Not Only May But Must Disregard The Arbitrator's Ruling, And This Decision Conflicts With The Decisions Of Other United States Courts Of Appeals.

Established law holds that where a question possessing jurisdictional implications is intertwined with the merits of a case, the proper course of action is to assume jurisdiction exists and deal with the obligation as a direct attack on the merits of the plaintiff's case. In the instant case, the Eighth Circuit identified a question with jurisdictional implications: whether the Tribe's waiver of its sovereign immunity was broad enough to permit the relief awarded by the arbitrator. This being so, the Eighth Circuit should have deferred to the decision of the arbitrator, who possessed sole authority to resolve the case on its merits. Instead, the Eighth Circuit chose to disregard the arbitrator's decision and resolve this question based upon its own views. This Court should review this case to resolve the conflict between circuits created by the Eighth Circuit's decision.

The decisions of the Fifth, Seventh, Ninth, Tenth, and Eleventh United States Courts of Appeals hold that where

a question possessing jurisdictional implications is intertwined with the merits of a case, the jurisdictional question should be regarded as an attack on the merits and resolved accordingly. *Chatham Condominium Ass'n v. Century Village, Inc.*, 597 F.2d 1002, 1011 (5th Cir. 1979); *Pratt Central Park Ltd. Partnership v. Dames & Moore, Inc.*, 60 F.3d 350, 360 n. 8 (7th Cir. 1995); *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983); *Bell v. United States*, 127 F.3d 1226, 1228 (10th Cir. 1997); *Lawrence v. Dunbar*, 919 F.2d 1525, 1529-1530 (11th Cir. 1990). The Eighth Circuit appeared to agree with this position, at least prior to the instant case. *See Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990) (stating that a court should not rule on a jurisdictional question in advance of trial where "the jurisdictional issue is so bound up with the merits that a full trial may be necessary to resolve the issue.").

A jurisdictional question is "intertwined" with the merits of the case if a decision on the jurisdictional matter effectively would decide an element of the cause of action. *Lawrence v. Dunbar*, 919 F.2d at 1529; *Eaton v. Dorchester Dev. Co.*, 692 F.2d 727, 734 (11th Cir. 1982).

Under these circumstances, the proper course of action for the district court is "to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case." *Lawrence*, 919 F.2d at 1529 (*quoting Williamson v. Tucker*, 645 F.2d 404, 415 (5th Cir.), *cert. denied*, 454 U.S. 897 (1981)). The jurisdictional issue in such a case should be "referred to the merits, for it is impossible to decide one without the other." *Chatham*, 597 F.2d at 1011-1012. A court may not resolve the merits of

the case through the guise of determining jurisdiction. *Pratt*, 60 F.3d 350, 360 n. 8.

The application of this rule to the instant case is clear. The Eighth Circuit identified a jurisdictional question in its opinion: whether the Tribe's waiver of its sovereign immunity was broad enough to permit the relief awarded by the arbitrator. The parties stipulated that this question was subject to arbitration, and the arbitrator necessarily resolved this issue when she issued the award. This being so, the proper course on appeal was to view the Tribe's continuing argument concerning the scope of the waiver of its tribal immunity as an indirect attack upon the merits of the arbitration award, and defer to the decision of the arbitrator, who possessed sole authority to decide the case on its merits.

Yet, the Eighth Circuit chose to overlook the arbitrator's decision and resolve this question based upon its own analysis and views. This decision threatens to introduce disorder into the law, as attorneys and litigants review the Eighth Circuit's published decision and ask lower courts to do the same.

This decision further threatens to erode the protection properly afforded to arbitration awards. The FAA establishes a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital v. Mercury Const. Co.*, 460 U.S. 1, 24 (1983); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). The "unmistakably clear" purpose of the FAA was to ensure that arbitration procedure, when selected by the parties to a contract, be "speedy and not subject to delay or

obstruction in the courts." *Prima Paint Corp. v. Flood & Conklin Mfg., Co.*, 388 U.S. 395, 404 (1967).

The Eighth Circuit's opinion threatens to significantly diminish the protection afforded to agreements to arbitrate by enabling the losing party to seek indirect review of the merits of the case under the guise of raising jurisdictional questions. The question decided by the Eighth Circuit was "intertwined" with the merits of the case; indeed it was the *same* question as resolved on the merits. This "backdoor" assault on the role of the arbitrator is starkly inconsistent with the established federal policy of encouraging the expeditious resolution of disputes through arbitration.

It is conceded that the factual background of the cases cited above was different than in the instant case. In each of the previous cases, the ultimate question was the procedure to be used to resolve an issue affecting both jurisdiction and the merits, and the division of responsibility between judge and jury for making the determination. In the instant case, however, the decision on the merits already had been made. The difference does nothing to distinguish the cases and show that the established principal should not apply in this case. Indeed, it merely serves to underscore the excesses of the Eighth Circuit's decision.

The decision of the Eighth Circuit directly conflicts with numerous previous circuit court decisions. This case offers the Court an opportunity to affirm the favored status of arbitration under federal law and establish that arbitration awards may not be second-guessed on the merits through the indirect means of reviewing federal

jurisdictional questions. MRS respectfully submits that the Court should take this opportunity and establish clarity in this important area of the law.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for Writ of Certiorari.

Dated this 4th day of February, 2002.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 00-1094

Missouri River Services, Inc., a Delaware Corporation, Appellee, v. Omaha Tribe of Nebraska, a Federally Recognized Indian Tribe, Appellant.	* * * * * * * * * * * *	Appeal from the United States District Court for the District of Nebraska.

Submitted: October 23, 2000

Filed: September 12, 2001

Before McMILLIAN, ROSS and HANSEN, Circuit Judges.

ROSS, Circuit Judge.

The Omaha Tribe of Nebraska ("the Tribe") appeals from a final judgment entered in the district court refusing to vacate or modify an arbitration award in favor of Missouri River Services, Inc. ("MRS"). The award directed the Tribe to pay $6,206,358.00, plus interest, to MRS for its capital investment in an unsuccessful casino project on the Tribe's lands in Nebraska. For reversal, the

Tribe argues that the judgment violates its sovereign immunity. The Tribe also argues that the district court erred because the award failed to draw its essence from the agreement between the parties and is contrary to public policy. The Tribe especially challenges the arbitrator's decision directing that the award be satisfied from profits generated by a casino operating on the Tribe's lands in Iowa. For the reasons stated below, we reverse and remand.

BACKGROUND

On December 10, 1987, the Tribe and Steicher & Sons, later renamed MRS, entered into an agreement in which the Tribe gave MRS the exclusive right to construct and operate a gaming facility on the Tribe's lands. The agreement provided that the facility would be "suitable for the purpose of operating highstakes bingo and other gaming activities, as well as complementary businesses," collectively referred to as the "Enterprise." Under the agreement, MRS was responsible for securing the necessary funds to construct the casino, and "its capital investment would be repaid from revenues of the Enterprise."

In the event of disputes arising under the agreement, Article XI provided for binding arbitration. Article XI also provided for a waiver of the Tribe's sovereign immunity as follows:

> [The Tribe] hereby waives its sovereign immunity from suit with respect to any disputes arising under this Agreement, but only to the extent of all real and personal property purchased pursuant to this Agreement, and [the Tribe] further agrees that judgment upon any arbitration

> award may be entered in any court having jurisdiction thereof. . . . Any monetary judgment or award may be satisfied only out of such property and/or out of [the Tribe's] share of any future [net operating profits] under this Agreement.

Pursuant to Article VI of the agreement and 25 U.S.C. § 81, the parties submitted the agreement to the Bureau of Indian Affairs ("BIA") for approval. Article VI provided that MRS was "not obligated to proceed with its obligations herein until such approval shall have been obtained." As relevant here, § 81 provided that an agreement with an Indian tribe "for the payment or delivery of any money . . . or for the granting or procuring any privilege . . . in consideration of services for said Indians relative to their lands . . . shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it." Section 81 further provided: "All contracts or agreements made in violation of this section shall be null and void."

By memorandum of April 7, 1986, the BIA requested that the parties make certain changes to the agreement. To obtain the necessary approval, the parties amended the agreement to add Article XIX, which stated: the "Location of the Enterprise" was "Thurston County, Nebraska" and Article XX, which stated: "The Enterprise shall conduct Bingo and Bingo-related activities." On February 12, 1988, the BIA approved the agreement, as amended (the "Agreement").

In October 1988, Congress passed the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* ("IGRA"), which requires that all contracts dealing with gaming on Indian

land be approved by the chairperson of the National Indian Gaming Commission ("NIGC"). IGRA defines three classes of gaming, with Class I being social games, Class II being bingo and similar games, and Class III being all other forms of gambling. 25 U.S.C. § 2703(6)-(8). IGRA permits Class III gaming on Indian lands, provided that such activities are "located in a State that permits such gaming," and are "conducted in conformance with a Tribal-State compact." 25 U.S.C. § 2710(d)(1). Although MRS knew of the pending passage of the IGRA, knew that Nebraska prohibited Class III gaming, and a facility without Class III gaming would not be economically feasible, it nonetheless had begun construction of a Class III gaming casino, assuming that it would be grandfathered in under the IGRA.

In November 1988, MRS opened the facility for bingo and announced a full casino with Class III gaming would open on December 31, 1988. On December 30, 1988, the United States Attorney for the District of Nebraska informed the parties that they could not conduct Class III gaming, threatening prosecution. On January 5, 1989, MRS sought federal judicial relief, asserting that the casino fell within the scope of the grandfather clause of the IGRA. The district court disagreed and denied relief, and MRS did not appeal. As MRS believed, the bingo operation was not financially feasible. In September 1989, MRS closed the casino, after having invested in excess of six million dollars in capital and operating expenditures.

In October 1989, the Tribe and MRS executed a "Second Amendment to Agreement," which was never approved by the BIA nor the NIGC. The amendment stated that although the parties had intended that the

Enterprise include Class III gaming, the Enterprise had ceased operations due to the passage of the IGRA and the inability of the Tribe to reach a compact with the State of Nebraska to permit Class III gaming. In order that the Tribe could conduct gaming at other locations within its lands, MRS agreed to waive the exclusivity clause of the Agreement. In 1991, the Tribe contracted with another company to open and operate a casino to conduct Class III gaming on the Tribe's lands in Onawa, Iowa. The Tribe and the State of Iowa entered into the necessary tribal-state compact. The casino opened in approximately July 1992. According to MRS, the casino generated more than $9 million in profits in the first year, most of which resulted from Class III gaming.

MRS demanded arbitration, seeking, among other things, reimbursement of its capital investment in the Nebraska facility. The Tribe resisted, asserting that MRS had not exhausted tribal court remedies. MRS filed a state court suit, seeking to enjoin the tribal court proceedings. The Tribe removed the suit to federal district court, which eventually held that exhaustion of tribal court remedies was not required. In pre-hearing submissions to the arbitrator, each party accused the other of having breached the Agreement. The Tribe also argued that the Agreement limited MRS's "right to recover its capital investment to the extent that there were any operating profits from the bingo operation or to the property purchased pursuant to the Agreement." The arbitrator found in favor of MRS on its reimbursement claim, awarding it $6,206,358.00 for its capital investment, plus interest. The arbitrator directed that "[t]he award is to be paid from the Enterprise, which includes all gaming operations on the reservation of the

Omaha Tribe of Nebraska (the Property), including specifically the gaming operation at Onawa, Iowa; or from any other funds [the Tribe] may elect to use."

MRS filed a motion in the district court to confirm the award. The Tribe filed a motion to vacate, or in the alternative to modify the award. In confirming the award, the district court rejected the Tribe's argument that entry of the award would violate its sovereign immunity. The court noted that a waiver of immunity must be clear and unambiguous, that a court must construe a waiver narrowly, and that the Tribe's waiver of immunity was limited. However, the court believed the arbitrator had determined the scope of the waiver and that "it [wa]s not at liberty to disturb that interpretation." The court also rejected the Tribe's arguments that the arbitration award failed to draw its essence from the agreement.

DISCUSSION

Waiver of Tribal Immunity

We first consider the Tribe's arguments concerning waiver of immunity from suit. The Tribe argues that the district court erred in deferring to the arbitrator's interpretation of the scope of its waiver. Assuming the arbitrator attempted to interpret the scope of the waiver of immunity, which we doubt, we agree with the Tribe that the district court erred in believing it could not disturb her interpretation. Because a waiver of immunity from suit implicates jurisdictional concerns, a court must satisfy itself that jurisdiction exists. *See Jones v. United States*, 255 F.3d 507, 511 (8th Cir. 2001). Contrary to MRS' suggestion, the Tribe's attorney could not expand the scope

of the Tribe's waiver from suit in the pre-hearing submission to the arbitrator. *See United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506, 513 (1940) ("immunity cannot be waived by [tribal] officials"). In any event, we review de novo the question of whether the Tribe waived its sovereign immunity. *Rosebud Sioux Tribe v. Val-U Constr. Co.*, 50 F.3d 560, 562 (8th Cir.), *cert. denied*, 516 U.S. 819 (1995).

It is well settled "that Indian tribes possess the same common-law immunity from suit traditionally enjoyed by sovereign powers." *Val-U Constr. Co. v. Rosebud Sioux Tribe*, 146 F.3d 573, 576 (8th Cir. 1998). The Supreme Court recently reaffirmed that a tribe may waive its immunity, but "a tribe's waiver must be 'clear.' " *C & L Enter., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 121 S. Ct. 1589, 1594 (2001) (quoting *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991)). In that case, an Indian tribe had expressly agreed to arbitration of contractual disputes and to entry of judgment upon the award in a court having jurisdiction thereof. Although the tribe had not used "magic words," *see Rosebud Sioux Tribe*, 50 F.3d at 563, the Court held that it had waived immunity "with the requisite clarity." 121 S. Ct. at 1594.

In this case, the Tribe did use "magic words" to waive its immunity. However, the critical question is not whether the Tribe waived immunity, but rather, "the extent to which that immunity was waived." *Namekagon Dev. Co. v. Bois Forte Res. Hous. Auth.*, 517 F.2d 508, 510 (8th Cir. 1975). Because a waiver of immunity " 'is altogether voluntary on the part of [a tribe], it follows that [a tribe] may prescribe the terms and conditions on which it

consents to be sued, and the manner in which the suit shall be conducted.' " *American Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985) (quoting *Beers v. Arkansas*, 61 U.S. 527, 529 (1857)). In addition, if a tribe "does consent to suit, any conditional limitation it imposes on that consent must be strictly construed and applied." *Namekagon Dev. Co.*, 517 F.2d at 509.

As the district court noted, the Tribe's waiver of immunity was expressly limited. Although the Tribe consented that "judgment upon any arbitration award may be entered in any court having jurisdiction thereof," it placed limitations on the waiver by providing that "[a]ny monetary judgment or award may be satisfied only out of such property and/or out of [the Tribe's] share of any future [net operating profits] under this Agreement." *Id.* The Tribe argues because that the only enforceable agreement before the district court was the Agreement approved by the BIA, which unambiguously restricted the location of the Enterprise to Thurston County, Nebraska, and gaming activities to bingo and bingo-related activities, its waiver of immunity only extended to entry of a judgment to be satisfied by property or profits from the Nebraska facility.

MRS argues that in determining the scope of the Tribe's waiver, we should consider the intent of the parties that the Enterprise would include Class III gaming anywhere on the Tribe's lands, as was expressed in the December 1987 agreement and the so-called second amendment. We disagree. This case is similar to *Turn Key Gaming, Inc. v. Oglala Sioux Tribe*, 164 F.3d 1092 (8th Cir. 1999). In that case, a company had executed a contract

with an Indian tribe to construct and manage a gaming facility on the tribe's land. The contract was subject to the IGRA. While the parties were awaiting approval from the NIGC, they entered into interim agreements. They also attempted to orally modify the contract's approved ceiling on construction costs. When disputes arose, the company argued that it was "proper . . . to look to these other agreements in order to determine the intent of the parties." *Id.* at 1094. This court rejected the argument, holding that "these other agreements [could] have no effect with respect to any of the subject matter encompassed" by the approved contract. *Id.* at 1095. We stated that no matter the "correct approach in ordinary contract disputes, in the context of Indian gaming the directives of Congress, when made apparent, must control." *Id.* at 1094. In the context of the IGRA, we made clear that "any management contract that does not receive approval is void, and that any attempted modification of an approved contract that does not . . . receive approval, is also void." *Id.* (citing 25 C.F.R. §§ 533.7, 535.1(f)).[1]

In this case, the parties do not dispute that the December 1987 agreement was subject to approval by the BIA as required by 25 U.S.C. § 81,[2] and that any

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[1] Section 533.7 provides that "[m]anagement contracts . . . that have not been approved by the Secretary of the Interior or the [NIGC] Chairman . . . are void." Section 535.1 provides that "[m]odifications that have not been approved by the Chairman . . . are void."

[2] In *United States v. Turn Key Gaming, Inc.*, 2001 WL 921358, No. 00-3615, (8th Cir. Aug. 16, 2001), this court considered the scope of 25 U.S.C. § 81. The court held that because a rental agreement and an employment agreement were not "relative to"

agreement that did not have such approval is void.[3] In addition, MRS admits that although the second amendment was submitted to the NIGC, it was not approved. Although in the initial agreement the parties may have intended that MRS would be able to conduct Class III gaming on the Tribe's land in Iowa, the BIA did not approve that agreement. To obtain the necessary approval, the parties were required to amend the agreement. As approved, the Agreement unambiguously restricted the "Location of the Enterprise" to "Thurston County, Nebraska" and "Gaming Activities" to "Bingo and Bingo-related activities." By the express terms of the only enforceable, valid agreement before the court, the Tribe's waiver of immunity was limited to entry of a judgment and execution thereon only as to property or profits from the Nebraska bingo facility. *See Namekagon Dev. Co.*, 517 F.2d at 510 (tribe waived immunity from

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Indian lands, they were not subject to the statute. *Id.*, at *7. However, we noted that cases had held that exclusive contracts to construct and manage a gaming facility on Indian lands were subject to the statute. *Id.*, at *5-6 (citing *Barona Grp. of Captain* [sic] *Grande Band of Mission Indians v. American Mgmt. & Amusement, Inc.*, 840 F.2d 1394, 1403 (9th Cir. 1987); *Winnebago Bus. Comm. v. Koberstein*, 762 F.2d 613, 614 (7th Cir. 1985)).

[3] As previously noted, at the time relevant to this appeal, § 81 provided that an agreement "shall bear the approval of the Secretary of the Interior . . . indorsed upon it" and that "[a]ll contracts or agreements made in violation of this section shall be null and void." In 2000, Congress reworded 25 U.S.C. § 81. In relevant part, the section now reads: "No agreement or contract with an Indian tribe . . . shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary."

levy and execution, but only as to certain specified funds).

On appeal MRS argues that it could have conducted Class III gaming under the Agreement because the BIA-approved term "bingo and bingo-related" activities was broad enough to permit it to conduct Class III gaming. That argument is frivolous. MRS admitted in the so-called second amendment that it could not conduct Class III gaming in the Nebraska facility in view of the IGRA. It was fortunate that the parties did not attempt to violate the law. We note the saga of the Santee Sioux Tribe of Nebraska. Despite inability to reach a compact with the State of Nebraska, the Santee Sioux Tribe opened a Class III gaming casino on its lands in Nebraska. The chairman of the NIGC issued a closure order, noting the casino was operating in violation of the IGRA. We held that the district court had jurisdiction to enforce the closure order, noting that the Tribe's gaming activities violated the IGRA because they were "being conducted in contravention of Nebraska law." *United States v. Santee Sioux Tribe of Neb.*, 135 F.3d 558, 563-64 (8th Cir.), *cert. denied*, 525 U.S. 813 (1998). After the tribe refused to comply with a district court injunction ordering closure, this court held that the tribe and tribal council members should be held in contempt and that twenty-three of the tribe's bank accounts were subject to garnishment. *United States v. Santee Sioux Tribe of Neb.*, 254 F.3d 728, 734-36 (8th Cir. 2001).

Arbitration Award

We now turn to the Tribe's arguments concerning the arbitration award. Unlike our review of a waiver of sovereign immunity, our review of an arbitration award is very limited. *Major League Baseball Players Ass'n v. Garvey*, 121 S. Ct. 1724, 1728 (2001). Among other things, the Federal Arbitration Act, 9 U.S.C. § 10(a) provides for vacation of an award if an arbitrator exceeds the scope of her authority. In addition, an arbitration " 'award will [ ] be set aside where it is completely irrational or evidences a manifest disregard for the law.' " *Hoffman v. Cargill Inc.*, 236 F.3d 458, 461 (8th Cir. 2001) (quoting *Val-U Constr. Co.*, 146 F.3d at 578). An arbitration award is "irrational where it fails to draw its essence from the agreement." *Id.* at 462. An award "manifests disregard for the law where the arbitrators clearly identify the applicable, governing law and then proceed to ignore it." *Id.*

However, "[a]lthough the arbitrator's authority is broad, it is not unlimited." *Trailmobile Trailer, LLC v. Int'l Union of Elec. Workers*, 223 F.3d 744, 747 (8th Cir. 2000). It is well-established that "[t]he arbitrator 'may interpret ambiguous language,' but he may not, however, 'disregard or modify unambiguous contract provisions.' " *Osceola County Rural Water Sys., Inc. v. Subsurfco, Inc.*, 914 F.2d 1072, 1075 (8th Cir. 1990) (quoting *Inter-City Gas Corp. v. Boise Cascade Corp.*, 845 F.2d 184, 187 (8th Cir. 1988)). In other words, "[i]f the arbitrator 'interprets unambiguous language in any way different from its plain meaning, [the arbitrator] amends or alters the agreement and acts without authority.' " *Id.* (quoting *Inter-City Gas Corp.*, 845 F.2d at 187).

Even under this limited review, we find that the award failed to draw its essence from the Agreement. Because "contracts often lack explicit provisions for specific kinds of remedies[,]" it falls to the arbitrator to devise one. *Amalgamated Transit Union, Local No. 1498 v. Jefferson Partners*, 229 F.3d 1198, 1201 (8th Cir. 2000). However, the Agreement in this case expressly provided that an award could only be satisfied from property or profits under it. *See Namekagon Dev. Co.*, 517 F.2d at 510. Again, the only valid agreement before the arbitrator was the Agreement approved by the BIA, which clearly restricted the location of the Enterprise to Thurston County, Nebraska, and gaming to bingo and bingo-related activities. The arbitrator was not free to disregard this unambiguous language and craft her own remedy. *Compare Jefferson Partners*, 229 F.3d at 1201 (upholding arbitrator's choice of remedy because "[n]othing in the contract prohibits this choice") with *Coast Trading Co. v. Pac. Molasses Co.*, 681 F.2d 1195, 1198 (9th Cir. 1982) (vacating "arbitration award as being contrary to remedies provided in the contract" and rejecting argument that post-dispute submission modified terms of contract).

Because the BIA-required limitations on location and gaming are clear and unambiguous, contrary to MRS' argument, the contractual language cannot reasonably be construed to include proceeds generated under a different agreement the Tribe had executed with a different party to conduct Class III gaming in a different state. To the contrary, "[t]he arbitrator's decision does not draw its essence from the contract because it is expressly contrary to the terms of the agreement." *Int'l Paper Co. v. United Paperworkers Int'l Union*, 215 F.3d 815, 818 n.1 (8th Cir.

2000). Simply put, "[t]he arbitrator did not interpret the contract, [s]he rewrote it" by eliminating the geographical limitation to "Thurston County, Nebraska" and the gaming limitation to bingo and bingo-related activities. *Id.* In so doing, we believe that she effectively overrode the policies behind § 81 and the IGRA, which are to protect Indian tribes and to promote their economic development. *See Turn Key,* 164 F.3d at 1095 (IGRA); *Ringsred v. City of Duluth,* 828 F.2d 1305, 1308 (8th Cir. 1987) (§ 81).

The Tribe also challenges other findings of the arbitrator. However, the Tribe has not demonstrated that these findings are totally irrational or manifest a disregard for the law. *See Hoffman,* 236 F.3d at 461-62.

In sum, we hold that the district court erred because the Agreement, as approved by the BIA, does not permit satisfaction of a monetary award from profits and proceeds of the Iowa casino. Thus, the judgment in favor of MRS should be strictly limited, as the Agreement provides, to profits of and property purchased for the Nebraska facility.

Accordingly, we reverse the judgment of the district court and remand for further proceedings not inconsistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

MISSOURI RIVER SERVICES, INC., a Delaware corporation, Plaintiff, v. OMAHA TRIBE OF NEBRASKA, a federally recognized Indian Tribe, Defendant.	8:96CV202 MEMORANDUM OPINION (Filed Nov. 17, 1999)

This matter is before the Court on plaintiff Missouri River Services, Inc.'s ("MRS"), motion for an order confirming arbitration award (Filing No. 46) and the defendant Omaha Tribe of Nebraska's ("Tribe"), motion to vacate the arbitration award, or in the alternative, to modify said award (Filing No. 52). The defendant alleges that the award should be vacated or modified, because: (1) the arbitrator's award exceeded the scope and jurisdiction of the contractual grant of authority by, among other things, failing to strictly construe the Tribe's waiver of sovereign immunity; (2) that the United States is an indispensable party that was not joined; and (3) that the arbitrator's award was internally inconsistent and did not draw its essence from the contract. MRS claims that the award should be confirmed because (1) the contract granted the arbitrator full authority to issue the relief; (2)

the tribe waived its sovereign immunity; (3) the Agreement did not restrict MRS's exclusivity to gaming operations; (4) the United States is not an indispensable party; and (5) the arbitration award is not internally inconsistent. A hearing on the motions was held on September 21, 1999.

After careful consideration of the evidence, the briefs, and the applicable law, the Court finds that defendant's motion to vacate, or in the alternative modify, the arbitration award will be denied, and plaintiff's motion to confirm the arbitration award will be granted.

I. Background

On December 10, 1987, MRS and Omaha Tribe entered into an agreement for the construction and management of a gaming facility on the Tribe's reservation. Pursuant to 25 U.S.C. § 81, the December 10th Agreement was approved by BIA after a required amendment was executed. MRS then began construction of the gaming facility, and after resolving funding difficulties, it opened for gaming on November 12, 1988. The operation of the facility ceased in October of 1989.[1]

In the interim, Congress passed the Indian Gaming Regulatory Act, 25 U.S.C. § 2711, et seq. ("IGRA"), which requires all contracts dealing with gaming on Indian land be approved by the Chairman of the National Indian

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[1] The State of Nebraska refused to approve the December 10th Agreement; therefore, MRS could only operate bingo games at the facility and not casino-style gaming.

Gaming Commission ("NIGC"). In December of 1995, the Tribe submitted the Agreement to NIGC; however, by letter dated November 18, 1996 (Exhibit 41), the Chairman declined to review the contract for conformance with the requirements set forth in IGRA, because gaming operations had previously ceased. Subsequently, the Omaha Tribe contracted with another company to construct and manage a gaming facility, now known as Casino Omaha, in Onawa, Iowa.

The tortured history of this case and other facts are found in the Court's Memorandum Opinion of October 7, 1997, which are incorporated herein by this reference (Filing No. 32).

Pursuant to Article XI of the agreement, the dispute between the parties was referred to arbitration. arbitration hearings were held, and the arbitrator's award was issued on May 12, 1999. The arbitrator awarded MRS $6,384,435.00. (Arbitration Award at 2-3). The arbitrator awarded that amount "due to breach by the Tribe of its contractual obligation to repay MRS' capital investment, plus interest, in the casino project." This amount was to be paid "from the Enterprise, which includes all gaming operations on the reservation of the Omaha Tribe of Nebraska (the Property), including specifically the gaming operation at Onawa, Iowa. . . . " (Arbitration Award at 2). The Arbitration Award does not specify the factual or legal findings leading to the conclusions therein.

II. Discussion

Two issues will be addressed in this memorandum opinion. The first issue, raised by the Court *sua sponte*, is the issue of subject-matter jurisdiction. More specifically, (1) Must the parties first exhaust tribal court remedies? (2) Does the federal district court have subject-matter jurisdiction? (3) If so, has the Tribe waived its sovereign immunity?

A. Jurisdiction

Generally, a federal court must first allow a tribal court to determine its own jurisdiction to hear a case, regardless of the basis of federal jurisdiction. *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 15-16 (1987). In addition, comity considerations "direct that tribal remedies be exhausted before the question is addressed by the District Court." *Iowa Mutual Ins. Co.*, 480 U.S. at 15-16. According to the exhaustion requirement, a case, with some exceptions, must be filed with the tribal court before it may be heard by this Court.[2] The Court has previously addressed this issue in its March 29, 1996, opinion (Filing No. 6).

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[2] The Eighth Circuit concluded in a 1997 case that exhaustion was not required when it would serve no purpose other than to delay proceedings. When a tribal court's jurisdiction over a dispute involving a non-Indian on non-Indian lands is challenged in federal court, exhaustion is not required. *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1092-1093 (8th Cir. 1997) (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 460 n. 14, 117 S.Ct. 1404, 1416 n. 14 (1997)).

The Eighth Circuit, in addition to those exceptions set forth by the Supreme Court,[3] has also held that when a contract clause dictates a choice of forum, tribal exhaustion is not required. *FGS Contractors, Inc. v. Carlow*, 64 F.3d 1230, 1233 (8th Cir. 1995). In *FGS Contractors*, a subcontractor sued the general contractor for breach of a dam renovation contract. The contract contains a forum selection clause that read: "In the event there is any dispute between the parties arising out of this agreement, it shall be determined in the Oglala Sioux Tribal Court or other court of competent jurisdiction." *FGS Contractors*, 64 F.3d at 1233. The Eighth Circuit reversed the decision of the district court that exhaustion was required, stating that the clause in the contract allowed claims to be litigated in either the tribal court or another court with jurisdiction. *Id.*

Although this case involves the confirmation, modification, or vacation of an arbitration award, it is similar to *FGS Contractors* and essentially involves a breach of contract action. The arbitration clause provides that the judgment on an arbitration award "may be entered in any court having jurisdiction thereof." (Agreement at Art. XI.) Following the reasoning in *FGS Contractors*, the judgment could be entered in any court with jurisdiction, not just

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[3] There are three exceptions to this exhaustion requirement: (1) "where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith;" (2) "where the action is patently violative of express jurisdictional prohibitions;" or (3) "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *National Farmers Union Ins. v. Crow Tribe of Indians*, 471 U.S. 845, 856 n. 21, 105 S.Ct. 2447, 2454 n. 21.

tribal courts. The tribal remedies, therefore, need not be exhausted.

Apart from tribal exhaustion, the parties must demonstrate independent grounds for subject-matter jurisdiction. *Calvello v. Yankton Sioux Tribe*, 899 F.Supp. 431 (S.D. 1995); *see UHC Management Corp. v. Computer Sciences Corp.*, 148 F.3d 992, 995 (8th Cir. 1998) (stating "[t]he FAA does not itself confer jurisdiction"). In *Tom's Amusement Co., Inc. v. Cuthbertson*, 816 F.Supp. 403, 404 (W.D.N.C. 1993), two parties were involved in a contract dispute concerning gaming machines. The United States District Court for the Western District of North Carolina held that because the contract was subject to 25 U.S.C. § 81, the interpretation of that contract was a federal question. *See Tom's Amusement Co.*, 816 F.Supp. at 406 (citing *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358 (8th Cir. 1990), wherein the court did not question the existence of federal question jurisdiction pursuant to 25 U.S.C. § 81).[4] Title 26, U.S.C. § 81 required the contract at issue to be approved by the Bureau of Indian Affairs.[5] Therefore, the Court finds that it has federal question jurisdiction.

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[4] But *Cf. Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708, 714 (9th Cir. 1980) (holding that not all contracts under 25 U.S.C. § 81 confer federal jurisdiction on the district courts).

[5] It should be noted that the contract is also subject to the Indian Gaming Regulatory Act, although NIGC declined to evaluate the contract. if a contract is subject to IGRA, the interpretation thereof is a federal question. *Calvello v. Yankton Sioux Tribe*, 899 F.Supp. at 435.

The waiver of a tribe's sovereign immunity must be made in clear and unequivocal language by the tribe or by congressional abrogation. *Calvello*, 899 F.Supp. at 435 (quoting *Oklahoma Tax Comm'n v. Potawatomi Indian Tribe*, 498 U.S. 505, 509 111 S.Ct. 905, 909, 112 L.Ed.2d 1112 (1991)). When arbitration is involved, the court must look at the language of the arbitration clause to determine if the clause waives sovereign immunity. *Id.* The arbitration clause of the contract states:

> Owner [Omaha Tribe] hereby waives its sovereign immunity from suit with respect to any disputes arising under this Agreement, but only to the extent of all real and personal property purchased pursuant to this Agreement, and Owner further agrees that judgment upon any arbitration award may be entered in such court having jurisdiction thereof, and that such court's judgment may result in any executable lien being placed on any such Property. Any monetary judgment or award may be satisfied only out of such property and/or out of Owner's share of any future NOP under this Agreement.

(Agreement between Omaha Tribe and S&S, now MRS ("Agreement") at Art. XI).

From this language, the Court finds that the Tribe has waived its sovereign immunity with respect to this dispute.[6] It should be noted, however, that the waiver is

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[6] There may also be other grounds for the waiver of sovereign immunity. After the case was filed by MRS, the Tribe removed the case to federal court. *See* Filing No. 1. This action may act as an independent grounds for the waiver of sovereign

limited.[7] The parties stipulated that the interpretation of that limitation was subject to arbitration, and the Court entered an order in accordance therewith (Filing Nos. 38, 39).

The Court finds that it has subject matter jurisdiction, that the Tribe has waived its sovereign immunity with respect to the disputes arising under the Agreement, and that tribal remedies do not have to be exhausted prior to bringing these motions to this Court.

B. Arbitration

The motions in this case involve the confirmation or vacation (in the alternative modification) of an arbitration award. Generally, a court's review of an arbitration award "is extremely limited." *Executive Life Ins. Co. v. Alexander Ins. Ltd.*, 999 F.2d 318, 320 (8th Cir. 1993). The Federal Arbitration Act ("FAA") dictates four grounds under which a court may vacate an arbitration award. The court may vacate –

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immunity. Also, in *Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Assoc., Inc.*, 86 F.3d 656, 659, the United States Court of Appeals Seventh Circuit held that a tribe explicitly waived its sovereign immunity with the following arbitration clause in the contract: " 'claims, disputes, or other matters' arising out of or related to the contract 'shall be subject to and decided by arbitration in accordance with the rules . . . of the American Arbitration Association' " and " 'judgment may be entered upon [the arbitration award] in accordance with applicable law in any court having jurisdiction.' "

[7] *See infra* p. 11-13 (discussing the arbitrator's decisions regarding the meaning of "property" and "enterprise" as used in the agreement).

> (1) Where the award was procured by corruption, fraud, or undue means. (2) Where there was evident partiality or corruption in the arbitrators, or either of them. (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced. (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a)(1-4). The Tribe raises only the fourth ground as basis for vacation of the arbitration award.

1. Exceeding Authority.

The Tribe first claims: "[t]he arbitrator's award exceeded the scope and jurisdiction of the arbitrator's authority, as clearly and unambiguously defined in the Agreement, by granting relief prohibited by the contractual grant." An arbitrator gleans his/her authority from the agreement signed between the arbitrating parties. *Davis v. Chevy Chase Fin. Ltd.*, 667 F.2d 160, 165 (D.C.Cir. 1981) (citing *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). Furthermore, "[i]n deciding whether an arbitrator has exceeded contractual authority, the contract 'must be broadly construed with all doubts being in favor of the arbitrator's authority.' " *Executive Life*, 999 F.2d at 320 (quoting *Lackawanna Leather Co. v. United Food & Commercial Workers Int'l Union*, 706 F.2d 228, 230-31 (8th Cir. 1983)). According to the Agreement:

> In the event any controversy or claim arising out of this Agreement cannot be settled by the parties hereto, such controversy or claims shall be settled by binding arbitration in accordance with the then current rules of the American Arbitration Association.
>
> Owner ("Tribe") hereby waives its sovereign immunity from suit with respect to any disputes arising under this Agreement, but only to the extent of all real and personal property purchased pursuant to this Agreement, and Owner further agrees that judgment upon any arbitration award may be entered in such court having jurisdiction thereof, and that such court's judgment may result in any executable lien being placed on any such Property. Any monetary judgment or award may be satisfied only out of such property and/or out of Owner's share of any future NOP under this Agreement.

(Agreement at Art. XI). The Agreement also states that MRS (previously S & S, Inc.) was required to create and manage the operations of the "Enterprise and Property." "Property" as defined by the Agreement is that real property owned by the Trust of which the United States of America is Trustee and the Tribe is beneficiary (Agreement at 1). In addition, the parties were required by the Bureau of Indian Affairs to amend the agreement to include a specific reference to the "Enterprise." The Agreement identifies the "Enterprise" as the property located in Thurston County, Nebraska.

In the arbitrator's decision, she awarded MRS $6,384,435.00. "The award is to be paid from the Enterprise, which includes all gaming operations on the reservation of the Omaha Tribe of Nebraska (the Property),

including specifically the gaming operation at Onawa, Iowa . . . " (Arbitration Award at 2). Although the arbitrator did not give an explanation for her decision,[8] it is based upon a lengthy hearing, with numerous exhibits. In addition, she was required to interpret the contract, which is, at best, ambiguous, including interpretation of the terms "property" and "enterprise." " 'As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of [her] authority, that a court is convinced' the arbitrator 'committed serious error does not suffice to overturn [the] decision.' " *Executive Life Ins. Co.*, 999 F.2d at 320 (citing *Fairview Southdale Hosp. v. Minnesota Nurses Ass'n*, 943 F.2d 809, 811 (8th Cir. 1991). Furthermore, "it is for the arbitrator to interpret the contract, and we 'will not set aside the arbitrator's award even though we might have interpreted the contract differently.' " *Osceola County Rural Water System, Inc. v. Subsurfco, Inc.*, 914 F.2d 1072, 1075 (8th Cir. 1990) (citing *Inter-City Gas Corp. v. Boise Cascade Corp.*, 845 F.2d 184, 187 (8th Cir. 1988)).

2. Sovereign Immunity

As stated above, the Tribe expressly waived its sovereign immunity (Agreement at Art. XI). Although this waiver is to be narrowly construed, the Court does not find that the arbitrator's interpretation of the provision exceeded that waiver. Thus, the Court is not at liberty to

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[8] *See United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (stating "[a]rbitrators have no obligation to the court to give their reasons for an award").

disturb that interpretation. *See Osceola*, 914 F.2d at 1075 (stating that an arbitrator's interpretation should not be disturbed, even if the court would have interpreted the contract differently).

3. United States as an Indispensable Party.

The Tribe claims that the arbitrator's award should be vacated because the United States is an indispensable party to the motion to confirm. The Court disagrees. Federal Rule of Civil Procedure 19 dictates the qualifications of an indispensable party, none of which are applicable in this case.[9] Although the Court agrees that the United States is an indispensable party in certain cases involving tribal lands, the relief awarded in this case is monetary damages, not an interest in land. The cases that hold the United States to be an indispensable party involve actions for an ownership interest in Indian

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[9] A party is considered indispensable if:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party.

Fed. R. Civ. P. Rule 19(a).

lands.[10] The Tribe claims that "[i]t is inevitable . . . that the plaintiff [MRS] will be arguing against the interests of the United States of America as trustee of Tribal land [because] . . . [a]ll of the gaming facilities are firmly attached to real estate." (Brief in Support of Motion to Vacate at 29). Despite the likelihood of such an action, the question is not now before the Court and is not ripe for disposition.

4. Internal Inconsistency and Manfiest Disregard for the Law

In addition to the statutory grounds for vacation, the United States Court of Appeals for the Eighth Circuit has fashioned an additional circumstance. *Val-U Constr. Co. v. Rosebud Sioux Tribe,* 146 F.3d 573, 578 (8th Cir. 1998). In *Val-U Construction,* the Eighth Circuit held that an award will only be set aside if it is "completely irrational or evidences a manifest disregard for the law." *Val-U Constr.,* 146 F.3d at 578 (citing *Kiernan v. Piper Jaffray Companies, Inc.,* 137 F.3d 588, 594 (8th Cir. 1998)). In *Osceola,* the court stated: "a court may set aside an award if it fails to draw its essence from the contract." *Osceola,* 914 F.2d at 1075 (citing *George A. Hormel & Co. v. United Food & Commercial Workers, Local 9,* 879 F.2d 347, 349 (8th Cir. 1989), and *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 597, 80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424 (1960)).

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[10] *See Fontanelle v. Omaha Tribe of Nebraska,* 430 F.2d 143 (8th Cir. 1970) (involving an action to quiet title to land abutting the Missouri River) and *Imperial Granite Co. v. Pala Band of Mission Indians,* 940 F.2d 1269 (9th Cir. 1991) (involving an action for an easement of necessity across reservation lands).

The Tribe claims that the arbitrator's award should be vacated because it is internally inconsistent and evidences a manifest disregard for the law. The Tribe first alleges that the award gives MRS damages from the Tribe when the Agreement stated that "the Tribe would be protected and indemnified by MRS against any losses resulting from the investment or operation." (Brief in Support of Motion to Vacate at 32). The applicable provisions of the Agreement state:

> Whereas, the capital investment shall be repaid out of net operating profits of the enterprise . . . over a period of (10) years; Whereas, S & S, Inc.'s [now MRS] total capital investment to bring the property to satisfactory operating condition, together with interest accrued . . . shall be repaid over a period of (10) years; The total capital investment of S & S, Inc. shall be repaid to S & S, Inc. from revenues of the enterprise in equal monthly installments over a period of ten (10) years; S & S, Inc. shall be reimbursed for any of its costs . . . only to the extent provided in this Agreement, and only to the extent there shall exist net operating profits from which to reimburse or repay S & S, Inc. Owner shall at no time be required to reimburse or repay S & S, Inc. out of Owner's own funds . . . or out of any net operating profits already distributed to Owner.

(Agreement at pp. 2, 3, 13).

As stated earlier in this opinion, the arbitrator was given the authority to interpret the contract and its terms, and the Court will not go behind that decision.

The Tribe further argues that the arbitrator awarded damages to a party who abandoned a contract, in complete disregard of the law. When a party abandons a contract, he may not be awarded damages for breach by the other party. *Bruning Seeding Co. v. McArdle Grading Co.*, 232 Neb. 181, 439 N.W.2d 789 (1989). However, the arbitrator was required to make a finding of fact as to whether MRS abandoned the contract or was excused from performance thereof. This issue has been addressed by the arbitrator, and the Court will not review the merits of her decision. *Osceola*, 914 F.2d at 1075 (citing *Inter-City Gas Corp. v. Boise Cascade Corp.*, 845 F.2d 184, 187 (8th Cir. 1988)).

C. Modification

According to the FAA, a court may modify or correct an arbitration award:

> (a) [w]here there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award. (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted. (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

9 U.S.C. § 11(a-c). To the extent any of these grounds exist, they have been addressed and resolved in this memorandum opinion. For these reasons, as well as those

stated above,[11] the motion to modify the award will be also denied.

III. Conclusion

For the foregoing reasons, the Court will grant the plaintiff's motion to confirm the arbitration award, and deny defendant's motion to vacate or in the alternative modify the arbitration award. A separate order will be entered in accordance with this opinion.

DATED this 17th day of November, 1999.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM,
Senior Judge
United States
District Court

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[11] *See supra*, p. 11-13 (discussing the arbitrator's interpretation of the contract).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

MISSOURI RIVER SERVICES, INC., a Delaware corporation, Plaintiff, v. OMAHA TRIBE OF NEBRASKA, a federally recognized Indian Tribe, Defendant.	8:CV96-00202 MEMORANDUM OPINION (Filed Oct. 7, 1997)

This matter is before the Court on plaintiff, Missouri River Services, Inc.'s (MRS), renewed motion for preliminary injunction (Filing No. 24). Hearing was held on September 26, 1996, and evidence was adduced by both parties. After careful consideration of the evidence, this matters history, the parties' briefs and the applicable law, the Court finds that plaintiff's renewed motion should be granted.

BACKGROUND

On December 10, 1987, MRS and the defendant, Omaha Tribe of Nebraska (Tribe), entered into an agreement to finance, construct, maintain and manage a gaming facility on the Omaha Indian Reservation (Agreement). The Agreement was submitted to the Bureau of

Indian Affairs (BIA) and approved by them on February 12, 1988. MRS then began constructing the facility which the Tribe alleges was to be completed and open for business by September 1, 1988. MRS encountered difficulties in obtaining funding for the project. On October 25, 1988, the facility not yet completed, MRS obtained a $750,000 loan from John B. Croll (Croll) to finance continued construction. The facility was eventually completed and opened for Bingo gaming on November 12, 1988. On June 6, 1989 Croll loaned MRS another $470,000 and on August 9, 1989 an additional $89,000 to finance the gaming operation. However, the State of Nebraska refused to approve casino gaming on the Bingo operation alone was not financially successful. By October of 1989, MRS ceased operating under the Agreement. Subsequently, the Tribe contracted with another company to open and operate a casino gaming facility in Iowa. On August 22, 1992, Croll assigned the promissory notes he received from MRS to the Tribe.

The Agreement contains a provision concerning dispute resolution. Specifically, the Agreement states:

> "In the event any controversy or claim arising out of this Agreement cannot be settled by the parties hereto, such controversy or claims shall be settled by binding arbitration in accordance with the then current rules of the American Arbitration Association.
>
> [The Tribe] hereby waives its sovereign immunity from suit with respect to any disputes arising under this agreement, but only to the extent of all real and personal property purchased pursuant to this Agreement, and [the Tribe] further agrees that judgment upon any arbitration

> award may be entered in any court having jurisdiction thereof, and that such court's judgment may result in any executable lien being placed on any such Property. Any monetary judgment or award may be satisfied only out of such property and/or out of [the Tribe's] share of any future [net operating profits] under this agreement. [MRS] agrees that judgment upon any arbitration award may be entered in any court of competent jurisdiction and that such court's judgment shall be collectible in the manner provided by applicable law.
>
> [MRS] and [the Tribe] agree that this Agreement will remain in full force and effect throughout any such binding arbitration or court proceeding(s) and, further, that this Agreement shall continue in effect for so long as it is required for [MRS] to satisfy such judgment, if any, in addition to any other amounts due and payable under this Agreement, out of [net operating profits]."

Agreement, Ex. A, Mar. 28, 1996, Hearing. On January 30, 1995, MRS filed a Demand for Arbitration with the American Arbitration Association (AAA). MRS claimed the Tribe's contracting with another company to operate the Iowa facility breached MRS' exclusive right under the Agreement to conduct gaming for the Tribe and that the Tribe owed them capital payments pursuant to the Agreement. On March 24, 1995, the Tribe responded to the demand by denying MRS' claims and by making counterclaims based on the notes they received by assignment from Croll. The arbitration proceeding then began. An arbitration site was determined, arbitrators were chosen, correspondence and discovery material were exchanged,

and the arbitration hearing was scheduled for February 6 and 7, 1996. On January 24, 1996, MRS filed its pre-hearing statement with arbitrators. The Tribe filed its pre-hearing statement on January 31, 1996.

The orderly resolution of this dispute then took a tortuous course. On February 1, 1996, the Tribe filed a verified complaint for declarative relief, injunctive relief and monetary damages against RMS in its Tribal Court. The Tribe simultaneously filed a motion for a temporary restraining order to restrain MRS from proceeding with arbitration. In its verified complaint, the Tribe alleged that the Agreement was void because it violated the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 et seq. (IGRA), that MRS assigned its rights under the Agreement to Croll, that MRS breached the Agreement, and finally, sought the same claims based on the Croll notes that were made in the arbitration proceedings. The Tribal Court issued a temporary restraining order on that same day and scheduled a preliminary injunction hearing for February 14, 1996. On February 2, 1996, MRS, the Tribe, an arbitrator and an AAA administrator participated in a telephonic conference for the purpose of finalizing arrangements for the upcoming hearing. During this conference, the Tribe informed MRS and the arbitrators of the Tribal Court case and the temporary restraining order. Despite the restraining order, the arbitrator decided to proceed with the February 6 and 7, 1996, hearings. At that hearing, both parties presented evidence and cross-examined witness. An additional day of hearing was then scheduled for March 1, 1996.

On February 14, 1996, the Tribal Court held the preliminary injunction hearing and decided to extend the

temporary restraining order to February 27, 1996, at which time a second hearing would be held. On February 21, 1996, the Tribe filed a motion to show cause why MRS should not be held in contempt of court for violating the temporary restraining order. On February 27, the second hearing was held and the temporary restraining order was further extended to March 14, 1996. On March 1, 1996, the parties met with the arbitrator. The arbitrator decided to stay the arbitration pending further developments in the Tribal Court. On March 5, 1996, the Tribe moved for partial summary judgment and asked the Tribal Court to permanently enjoin the arbitration proceedings. On March 14, 1996, the Tribal Court held a third hearing on the motions present by the Tribe. At the conclusion of the hearing, the Tribal Court extended the temporary restraining order pending its decision on the preliminary injunction.

MRS then filed suit in the District Court of Thurston County, Nebraska on March 20, 1996, seeking temporary and permanent injunctions compelling the Tribe to continue and complete the arbitration proceedings and to dismiss its Tribal Court case. The Tribe removed the case to this Court on March 26, 1996. On March 28, 1996, this Court conducted an evidentiary hearing on MRS' request for temporary restraining order. By memorandum opinion and order dated March 29, 1996, the Court denied MRS' request and stayed this action pending MRS' exhaustion of its Tribal Court remedies (Filing Nos. 6 and 7). Back in the Tribal Court, while the decision regarding the Tribe's motions was still pending, the Tribe filed motion for leave to file a First Amended Complaint on October 17, 1996. The First Amended Complaint added a

claim that MRS made certain assignments that violated IGRA, tribal law and the Agreement. On October 30, 1996, the Tribal Court issued its order regarding the motions that remained pending since the March 14, 1996, hearing. The Tribal Court denied the motions for preliminary injunction, to show cause and for partial summary judgment and dissolved the temporary restraining order. In its order, the Tribal Court noted that the Tribe essentially alleges "that the Court should enter a permanent injunction enjoining [MRS] from proceeding with arbitration insofar as the Agreement has not been reviewed by the Chairman of the Indian Gaming Commission (NIGC)." Ex. 3, Sept. 26, 1997, Hearing. IGRA became effective on October 10, 1988, and established the NIGC to supervise Indian gaming activities and approve management contracts that meet specific statutory criteria set out in IGRA. The NIGC did not become operative until February 22, 1993.[1] The Tribe did not request the Agreement be reviewed by the NIGC until December of 1995, after arbitration had begun. On November 11, 1996, the NIGC responded to the request by informing the parties that they, without waiving the right to do so, would not review the Agreement at that time because no gaming had been conducted pursuant to the Agreement since 1989. The temporary restraining order having been dissolved and the response having been received from the NIGC, MRS moved to reinstate the arbitration proceedings.

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[1] *See Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1418 n. 10 (8th Cir. 1996).

Arbitration was reinstated and the parties were given notice on June 2, 1997, that the second round of hearings would be held on September 17-19, 1997. In the mean time, [sic] however, a hearing was held on July 10, 1997, in Tribal Court on the Tribes motion for leave to file the First Amended Complaint. On that same date, the Tribal Court issued an order granting the Tribe leave to file its First Amended Complaint and giving MRS until August 19, 1997 to respond. MRS alleges they responded to the order by mailing a "Motion to make more definite statement of claims" (sic) to the Tribal Court on August 13, 1997. However, the Tribal Court, for whatever reason, did not receive a response from MRS by August 19, 1997. As a result, on August 20, 1997, the Tribe moved for default judgment, or in the alternative, summary judgment, on all of its claims. A Tribal Court hearing on the motion was set for September 23, 1997. MRS responded by what it alleges was a re-filing of its motion for more definite statement on August 27, 1997.

Meanwhile, the parties continued preparation for the September 17-19, 1997, arbitration hearings. On September 2, 1997, the Tribe submitted a pre-hearing statement of the issues to the arbitrators. On September 17, 1997, the parties proceeded with the arbitration hearings as scheduled and completed evidence presentation to the arbitrators. On the same day, September 17, 1997, MRS filed with this Court a renewed motion for preliminary injunction (Filing No. 24) requesting this Court to: (1) compel defendant, Omaha Tribe of Nebraska, to complete arbitration of all disputes arising under the Agreement dated December 10, 1987, between MRS and the Tribe in

accordance with the terms of that Agreement; (2) mandate that the Tribe immediately stay Case No. CV 96-141 filed in the Tribal Court of the Omaha Tribe of Nebraska and withdraw all motions filed therein pending resolution of the above-captioned lawsuit, and (3) enjoin the Tribe from filing any further action or actions seeking to delay or halt or otherwise in connection with the arbitration of any dispute under the Agreement pending resolution of the above-captioned lawsuit. A hearing in this Court was scheduled for September 26, 1997. On September 19, 1997, the Tribal Court hearing scheduled for September 23, 1997, was continued to October 8, 1997. On September 26, a hearing was held on MRS' renewed motion and additional evidence and arguments were presented.

PRELIMINARY INJUNCTION STANDARD

A preliminary injunction is extraordinary relief. *Sanborn Mfg. Co., Inc. v. Campbell Hausfeld/Scott Fetzer Co.*, 997 F.2d 484, 485 (8th Cir. 1993). The Court considers the following factors when determining when to issue a preliminary injunction: "(1) the probability of success on the merits; (2) the threat of irreparable harm to the movant; (3) the balance between this harm and the injury that granting the injunction will inflict on other interested parties; and (4) whether the issuance of an injunction is in the public interest." *Id.* citing *Datapahse Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir.1981) (en banc). In weighing these factors, no single factor is in itself dispositive." *Id.* "Rather, all of the factors must be considered to determine whether the balance weighs towards granting the injunction." *Id.* (internal citation omitted). However,

as a rule, before a federal district court may consider a case involving tribal authority, all tribal court remedies must first be exhausted. *Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1300 (8th Cir. 1994) *cert. denied*, 513 U.S. 1103, 115 S.Ct. 779, 130 L.Ed.2d 673 (1995). The Court denied MRS' initial motion without considering the above preliminary injunction standard because MRS had not exhausted all of their Tribal remedies and did not fall within one of the well recognized exceptions to the above rule. *See* Memorandum Opinion dated March 29, 1996 (Filing No. 6).

DISCUSSION

The Tribe at oral argument and in its brief essentially states that its Tribal Court case is necessary for two reasons. First, a court needs to determine whether or not the Agreement is void and, as a result, the arbitration clause is void. Second, if the Agreement is not void, a court needs to determine what issues are arbitrable under the Agreement.

A. Agreement's Validity

MRS is not required to exhaust its Tribal Court remedies in situations in which Tribal Court review violates an express jurisdictional prohibition. *Iowa Mutual Inc. Co. v. LaPlante*, 480 U.S. 9, 19 n.12, 107 S.Ct. 971, 978 n.12, 94 L.Ed.2d 10 n.12 (1987); *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 856 n. 21, 105 S.Ct. 2447, 2454 n. 21, 85 L.Ed.2d 818 n.21 (1985). The Eighth Circuit recently held "that the NIGC has exclusive authority to determine a contract's compliance with

IGRA and its regulations." *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1420 (8th Cir. 1996). The Tribes First Amended Complaint in Tribal Court alleges the Agreement violates specific provisions of IGRA and, as a result, the Tribal Court should declare the Agreement void. Such a determination violates the NIGC's exclusive authority and is beyond the Tribal Courts jurisdiction. Therefore, this Court is not required to defer to the Tribal Court with respect to this issue and may resolve it at this time.

Even though the Agreement was entered into prior to the effective date of IGRA, IGRA and the regulations require that all gaming management contracts approved prior to IGRA's effective date be submitted to the NIGC after it was organized. *See* 25 U.S.C. §2712.[2] IGRA further provides that such contracts or agreements shall be valid unless disapproved. *Id.* As noted above, the parties ceased to operate under the Agreement almost three and a half years before the NIGC became operative. As a result, the NIGC never reviewed the Agreement on its own volition. However, the Tribe submitted the Agreement for review after arbitration was initiated. The NIGC

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[2] 25 U.S.C. §2712(a), in relevant part, states "[a]s soon as practicable after the organization of the [NIGC], the Chairman shall notify each tribe or management contractor who, prior to October 17, 1988, . . . entered into a management contract, that such . . . contract, including all collateral agreements relating to the gaming activity, must be submitted for his review within sixty days of such notification. Any activity conducted under such . . . contract or agreement shall be valid under [IGRA] unless disapproved under this section."

declined to exercise their review power, having determined that no gaming had been performed under the Agreement for several years.[3] The Agreement, having not been disapproved by NIGC, remains valid under IGRA. *Id.*; *see also* 35 C.F.R. § 533.1(c). Thus, the Tribe's claim that the Agreement is void because it violates IGRA fails.

The Tribe also alleges the Agreement is void because it violates the Tribal Gaming Ordinance. The Tribe added this allegation to its First Amended Complaint along with claims of further IGRA violations. This Court recognizes that the Tribal Court has the exclusive authority to construe and interpret tribal law. *See National Farmers, supra; Runs After v. United States*, 766 F.2d 347, 352 (8th Cir. 1985). The Tribe provided this Court with a certified copy of the Tribe's Gaming Code and its amendments at the hearing on this motion. This Court need not construe nor interpret the tribal law to see that it does not apply to this matter. Omaha Tribe of Nebraska, Gaming Code § 1 plainly states that the Gaming Code is to be effective on April 13, 1992. As previously stated, gaming activities under the Agreement ceased prior to this effective date. The activities allegedly violative of the tribal law took place long before the Gaming Code became effective. The Tribe did not present this argument before the Tribal Court in its brief for summary judgment, but relied only

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[3] It is questionable whether IGRA applies to the Agreement at all. The Seventh Circuit has held that due to the regulatory scheme created by IGRA, it is only enforceable by the NIGC. Therefore, IGRA did not become effective until the NIGC was organized in 1993. *See Mosay v. Buffalo Bros. Mgmt., Inc.*, 20 F.3d 739 (7th Cir. 1994), *cert denied.*, 513 U.S. 866, 115 S.Ct. 185, 130 L.Ed.2d 119 (1994).

on its IGRA claims to support its claim that the Agreement was void. The Tribe's assertion of the tribal claim is without merit and is a procedural attempt to manipulate the notions of comity and further prolong a civil and orderly resolution of this dispute. There being no other claims of invalidity, the Court finds that the Agreement and arbitration clause included therein are valid.

B. Arbitrable Issues

The Tribe argues that if the Agreement is valid, the Tribal Court case is necessary to determine what issues are arbitrable. The Court agrees with the Tribe that the determination of what issues are arbitrable under an arbitration clause is a matter to be decided by the court and not the arbitrator. *AT&T Technologies, Inc. v. Communication Workers of America*, 475 U.S. 643, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986). At the hearing, the Tribe stated that if the Agreement is valid, it is necessary for the Tribal Court to determine what issues are arbitrable. The Tribe urges the Court to adopt the proposition that the tribal Court has jurisdiction to make such a determination, citing *Bruce Lien, supra*, and *Stockwest, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221 (9th Cir. 1989). It is unnecessary for the Court to make such a determination because the Tribe has not asked the Tribal Court to determine what issues are arbitrable. Rather, the First Amended Complaint seeks declaratory judgment, injunctive relief and monetary damages based on the merits of the same claims MRS presented for arbitration and on the claims the Tribe itself presented for arbitration over MRS' objection. The requested default judgment would not merely be a determination of what claims are arbitrable,

but would in effect prevent the completion of the arbitration of these claims as per the terms of the Agreement.

MRS is not required to exhaust its Tribal Court remedies with respect to challenging the requested default judgment. The Tribe validly agreed to resolve any claims or disputes arising from the Agreement through arbitration, waived its sovereign immunity with respect to any suit arising out of the Agreement, and agreed that judgment with respect to the arbitration clause could be entered in any court of competent jurisdiction. The claims raised in the default judgment are the same as those raised in arbitration. This being the case, the Court finds that there are no significant comity reasons to defer to the Tribal Court. *FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1233 (8th Cir. 1995); *Bruce Lien*, 93 F.3d at 1421.

C. Preliminary Injunction

The Court must now weigh the equities of this case and determine whether a preliminary injunction should issue. *American Train Dispatchers Assn. v. Burlington Northern, Inc.*, 551 F.2d 749, 751 (8th Cir. 1977). Arbitration of this dispute began in January of 1995. Both parties have presented their evidence and arguments to the arbitrators and the arbitration process is nearly complete. During arbitration, the Tribe filed suit in Tribal Court for judgment on the same claims. The Tribe argues that the Tribal Court case is necessary to seek a judicial determination of the Agreement's validity and what claims are arbitrable. As previously noted, this is a proper request. However, the Tribe's First Amended Complaint and motion for

default judgment do not simply request that these determinations be made, but instead seek monetary judgment on the claims and permanent restraint of the arbitration proceedings. As a result, the agreed upon resolution of this dispute through arbitration would be effectively thwarted, thus irreparably injuring both parties right to arbitrate disputes arising under the Agreement.

Both parties' goal is final resolution of their respective claims. Having determined the Agreement is valid, the only remaining hurdle to be overcome before arbitration can be completed is the Tribes request that a court determine what claims may be decided by arbitration. The Tribe has not sought such a determination in Tribal Court. As noted above, the Tribe has waived its sovereign immunity and choice of forum, thereby giving this Court the authority to make such determination. It is beneficial to the Tribe, MRS and the resolution process that this Court make this determination and avoid further delay. It is clear to this Court that this benefit greatly outweighs the Tribe's burden of staying their Tribal Court case when that case will not provide them the relief they are seeking.

CONCLUSION

This matter is now before this Court for the second time and the parties have been seeking to resolve this dispute for over two years. Arbitration proceedings are nearly complete. The Agreement containing the arbitration clause is valid. The parties agree that once it is determined what claims are arbitrable, this dispute can be brought to a reasonably prompt conclusion. Such a

determination can properly be made by this Court. It is necessary to enjoin the Tribe from proceeding with the Tribal Court case in order to obtain this mutually desired result and prevent further procedural delays. Therefore, the Court will issue a temporary injunction staying the case pending in Tribal Court pending resolution in this Court. Further, the Court will schedule a hearing at the earliest available date at which the parties may present evidence and argument pertaining to the determination of what claims are subject to arbitration under the Agreement. The claims which are not subject to arbitration may then be resolved in the appropriate court. A separate order has been entered in accordance with this memorandum opinion.

DATED this 7th day of October, 1997.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM,
Senior Judge
United States District Court

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

MISSOURI RIVER SERVICES, INC., a Delaware corporation,	)	
Plaintiff,	)	8:CV96-00202
v.	)	ORDER
OMAHA TRIBE OF NEBRASKA, a federally recognized Indian Tribe,	)	(Filed Nov. 17, 1997)
Defendant.	)	

Pursuant to the Court's previous memorandum opinion,

IT IS ORDERED that a hearing to determine what issues are subject to arbitration is scheduled for:

Monday, December 15, 1997, at 9 a.m.

The parties are reminded that briefs are due five days before the hearing.

DATED this 13th day of November, 1997.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM,
Senior Judge
United States District Court

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

MISSOURI RIVER SERVICES, INC., a Delaware corporation,	)	
Plaintiff,	)	8:CV96-00202
v.	)	ORDER
OMAHA TRIBE OF NEBRASKA, a federally recognized Indian Tribe,	)	(Filed Mar. 4, 1998)
Defendant.	)	

This matter is before the Court on the stipulation of the parties (Filing No. 38). In accordance therewith,

IT IS ORDERED:

1) Each claim set forth by MRS in its prehearing statements dated January 24, 1996, and September 2, 1997, is subject to arbitration;

2) Each claim set forth by the Tribe in its prehearing statements dated January 31, 1996, and September 2, 1997, is subject to arbitration;

3) The Tribe's allegation that the alleged assignment or transfer of MRS stock to R. Ronald Schnier violated the Tribe's gaming ordinance is subject to arbitration; and

4) The arbitration shall continue to be conducted in accordance with the rules of the American Arbitration Association.

DATED this 4th day of March, 1998.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM,
Senior Judge
United States District Court

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 00-1094

Missouri River Services, Inc., a Delaware Corporation,	*	
Appellee,	*	Order Denying Petition for Rehearing and for Rehearing En Banc
v.	*	
Omaha Tribe of Nebraska, a Federally Recognized Indian Tribe,	*	
Appellant.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

November 5, 2001

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX G

AMERICAN ARBITRATION ASSOCIATION
COMMERCIAL ARBITRATION TRIBUNAL

In the matter of the Arbitration Between

Missouri River Services, Inc., Claimant

and,

Omaha Tribe of Nebraska, Respondent

Case Number: 77 199 0023 95

AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement found in the Agreement dated December 10, 1987, referenced in the Demand, and having been duly sworn and having duly heard the proofs and allegations of the parties, FIND and AWARD as follows:

FINDINGS

A. All claims and counterclaims made in this matter are arbitrable.

B. The following claims made by the Claimant in the Arbitration are resolved as described following:

Claims from Claimant's January 24, 1996 Pre-hearing Statement:

1. Claim for damages for breach of Agreement by contracting with Larita to build new casino in an amount to be determined
Claim denied due to restatement of claims in September 2, 1997 Pre-Hearing Statement

2. Claim for damages for failure to repay MRS' capital investment, plus interest, for $3,581,149.06
Claim denied due to restatement of claims in September 2, 1997 Pre-Hearing Statement.

3. Claim for recovery of reasonable value of benefits conferred upon Tribe prior to imposition of controls on Class III gaming in an amount to be determined
Claim denied due to restatement of claims in September 2, 1997 Pre-Hearing Statement.

Claims from Claimant's September 2, 1997 Pre-hearing Statement:

1. Claim for damages in the amount of $46,279,805.00 due to breach by the Tribe of MRS' exclusive right to conduct gaming operations within the exterior bounds of Tribe's reservation by contracting with Larita, Inc. to operate the casino in Iowa
Claim denied.

2. Claim for damages in the amount of $7,263,549.00 due to breach by the Tribe of its contractual obligation to repay MRS' capital investment, plus interest, in the casino project
Find for Claimant in the amount of $6,206,358.00, which includes interest for ten years as described in the December 10, 1987 Agreement, net of the Tribe's July 8, 1993 settlement with Mr. Croll adjusted for interest through December 31, 1998. The award is to be paid from the Enterprise, which includes all gaming operations on the reservation of the Omaha Tribe of Nebraska (the Property), including specifically the gaming operation at Onawa, Iowa; or from any other funds the Respondent may elect to use.

C. The following counterclaims made by the Respondents in the Arbitration Hearing are resolved as described following:

Counter claims from Respondent's January 31, 1996 Pre-hearing Statement:

1. Claim for damages in an amount in excess of $44,997.00 for breaching the Agreement by failing to pay contractors and the Internal Revenue Service
Claim denied due to restatement of claims in September 21, 1997 Pre-Hearing Statement

2. Claim for damages in the amount of $1,570,000.00 for breaching the Agreement by failing to commence operations on schedule
Claim denied due to restatement of claims in September 21, 1997 Pre-Hearing Statement

3. Claim for damages in the amount of $1,685,000.00 for breaching the Agreement by failing to adequately supervise the design and construction of the facility
Claim denied due to restatement of claims in September 21, 1997 Pre-Hearing Statement

4. Claim for continuing breach of Agreement by abandoning the enterprise in an amount to be determined
Claim denied due to restatement of claims in September 21, 1997 Pre-Hearing Statement

5. Claim for payment in the amount of $1,440,000.00, plus interest, under loan Agreements between MRS and the Tribe, assigned to the Tribe by John Croll
Claim denied due to restatement of claims in September 21, 1997 Pre-Hearing Statement

6. Claim for a finding that MRS has sold all of its rights and interest in the Agreement and has no right to assert any claims to arbitration
Claim denied due to restatement of claims in September 21, 1997 Pre-Hearing Statement

7. Claim for a finding that MRS has assigned all of its rights and interest in the Agreement to John Croll and since Croll in turn assigned such rights to the Tribe, MRS possesses no right to assert any legal claims against the Tribe arising from the Agreement
Claim denied due to restatement of claims in September 21, 1997 Pre-Hearing Statement

Counterclaims from Respondent's September 2, 1997 Pre-hearing Statement:

1. Claim for a finding that the Agreement, as Amended and Supplemented between the Tribe and MRS is void (and thus unenforceable) under the mandates of the IGRA, 25 U.S.C. P.2701 *et seq.* and 25 C.F.R. Part 500.
Denied.

2. Claim for damages for $4,255,000.00 due to MRS' breach of the agreement in the following areas:

   a. By failing to pay the contractors and subcontractors who constructed the bingo facility;
   Denied.
   b. By failing to construct the bingo facility on schedule;
   Denied.
   c. By failing to adequately supervise the design and construction of the bingo facility;
   Denied.

d. By failing to finance the bingo facility project as provided in the Agreement, as Amended and Supplemented;
Denied.

e. By failing to open the Bingo facility as was promised pursuant to the Agreement, as Amended and Supplemented;
Denied.

f. By failing to pay payroll taxes to the Internal Revenue Service;
Denied.

g. By failing to pay to the Tribe three percent (3%) of the gross revenues and fifty-one percent (51%) of the net operating profits as provided in the Agreement, as amended and Supplemented;
Denied.

h. By failing to perform the terms and conditions after MRS' abandonment of the Agreement, as Amended and Supplemented.
Denied.

3. Claim for a finding that MRS can not maintain this action after it assigned to John Croll all of MRS' right, title and interest in the Agreement, as Amended and Supplemented, including the right to arbitrate these claims.
Denied.

4. Claim for a finding that MRS is liable to the Tribe as the assignee of John Croll for all sums due under the Loan Agreements between MRS and John Croll for $1,440,000.00, plus interest.
Denied.

5. Claim for a finding that the Agreement, as Amended and Supplemented, limited the location of the Bingo enterprise to a specific piece of property in Thurston County, Nebraska.
Denied.

6. Claim for a finding that the Tribe was required to mitigate its damages after MRS abandoned the Bingo enterprise.
Granted. No damages awarded.

7. Claim for a finding that the Agreement, as Amended and Supplemented, strictly limits MRS' right to recover its capital investment to the extent that there are any operating profits from the Bingo enterprise or to the property purchased pursuant to the Agreement.
Denied.

8. Claim for a finding that the Tribe is immune from MRS' claim for unjust enrichment, as the Tribe did not waive its sovereign immunity with regard to claims for unjust enrichment.
Claim for unjust enrichment not asserted by MRS. No finding required.

9. Claim for a finding that the "unclean hands doctrine" prevents MRS from recovering under a theory of unjust enrichment.
Claim for unjust enrichment not asserted by MRS. No finding required.

10. Claim for a finding that MRS has abandoned its claim for unjust enrichment.
MRS did not assert a claim for unjust enrichment in its restatement of claims in September 2, 1997 Pre-Hearing Statement. Find for respondent.

D. As a result of the finding by Judge Strom that "The Tribe's allegations that the alleged assignment or transfer of Missouri River Services, Inc. (MRS) stock

to R. Ronald Schnier violated the Tribe's gaming ordinance is subject to arbitration;" the Tribe's allegation as described by Judge Strom will be treated in this arbitration as a counterclaim made by Respondent.

Claim for a finding that the assignment or transfer of MRS' stock to R. Ronald Schnier violated the Tribe's gaming ordinance is denied.

AWARD

After consideration of the evidence, I order the following:

1. The Omaha Tribe of Nebraska shall pay to Missouri River Services, Inc. the following amounts, not later than July 31, 1999, for Breach of Contract damages:

Damages, net of Tribe's settlement with Croll	$6,206,358.00
Interest from 1/1/99 through 5/12/99 at 8%	178,077.00
Total	$6,384,435.00

Interest at 8%, compounded annually, beginning as of May 13, 1999, shall be added to the award until the date of payment.

2. Each party is responsible for their own legal fees and costs, including the costs of the American Arbitration Association.

3. The administrative fees and expenses of the American Arbitration Association (the "Association") totaling $18,490.32 shall be borne as incurred by MRS and the Tribe. Therefore, MRS shall pay to the Association the sum of $281.50 representing MRS' share of administrative fees and expenses still due the Association.

4. The compensation and expenses of the arbitrator totaling $24,549.74 shall be borne as incurred by MRS and the Tribe. Therefore, MRS shall pay to the Association $2,524.87 and the Tribe shall pay to the Association $2,506.37 for their share of compensation and expenses still due the arbitrator.

5. Postponement fees shall be borne by party incurring same.

This Award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims and counterclaims not expressly granted herein are, hereby, denied.

Signed: Melinda M. Harper
Melinda M. Harper, Arbitrator

Dated this 12th day of May 1999

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

MISSOURI RIVER SERVICES, INC., a Delaware corporation, Plaintiff, v. OMAHA TRIBE OF NEBRASKA, a Federally recognized Indian Tribe, Defendant.	8:CV9600202 STIPULATION

COME NOW Missouri River Services, Inc., a Delaware corporation, Plaintiff herein (hereinafter "MRS"), and the Omaha Tribe of Nebraska, a Federally recognized Indian Tribe organized pursuant to the Indian Reorganization Act of June 18, 1934 (25 U.S.C. § 476), Defendant herein (hereinafter "Tribe"), who hereby stipulate as follows:

A. Each claim set forth by MRS in its prehearing statements dated January 24, 1996 and September 2, 1997 is subject to arbitration;

B. Each claim set forth by the Tribe in its prehearing statements dated January 31, 1996 and September 2, 1997 is subject to arbitration;

C. The Tribe's allegation that the alleged assignment or transfer of MRS stock to R. Ronald Schnier violated the Tribe's gaming ordinance is subject to arbitration; and

D. The arbitration shall continue to be conducted in accordance with the rules of the American Arbitration Association.

Respectfully submitted this 23 day of February, 1998.

BY MISSOURI RIVER SERVICES, INC., A DELAWARE CORPORATION:

LAW OFFICES OF JOHN D. MUSICK, JR. & ASSOCIATES

BY: /s/ John G. Nelson
John G. Nelson, *Pro Hac Vice*
1775 Sherman Street, Suite 2555
Denver, Colorado 80203
Telephone: 303/837-9665
Facsimile: 303/837-9689

CRARY, HUFF, INKSTER, HECHT, & SHEEHAN, P.C.

By: /s/ Michael P. Schmiedt/by JGN
Daniel L. Hartnett, No. 16493
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South Sioux City, Nebraska 68776
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ATTORNEYS FOR PLAINTIFF

BY THE OMAHA TRIBE OF NEBRASKA, A FEDERALLY RECOGNIZED INDIAN TRIBE

MONTEAU, PEEBLES & EVANS, L.L.P.

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Telephone: 402/333-4053

ATTORNEY FOR DEFENDANT

APPENDIX I

Excerpts of
AGREEMENT

THIS AGREEMENT is made this 10th day of December, 1987, by and between the Omaha Tribe of Nebraska; (hereinafter referred to as "Owner"), which is a federally-recognized Indian Tribe organized pursuant to the Indian Reorganization Act of June 18, 1934, (25 USC 476) and STREICHER & STEARNS, INC., a Delaware corporation (hereinafter referred to as "S & S, Inc.").

RECITALS

WHEREAS, the Owner is a federally-recognized Indian Tribe; and

WHEREAS, the Owner currently is the beneficiary of a trust of which the United States of America is Trustee, which trust owns real property (including land and/or existing facilities); hereinafter referred to as the ("Property"), that owner believes will, when, refurbished, be suitable for the purpose of operating highstakes bingo and other gaming activities, as well as complimentary business (hereinafter collectively referred to as the "Enterprises"); and

WHEREAS, the Owner desires to establish the Enterprise, so as to increase Owner's revenues, enhance Owner revenues, enhance Owner economic self-sufficiency and Tribal self-government, and to promote the health, education and welfare of the members of the Omaha Tribe of Nebraska; and

WHEREAS, the Owner is seeking financing and technical assistance for the development and operation of the Enterprise; and

WHEREAS, the parties to this Agreement, agree that S&S, Inc. has the ability to finance the establishment and operation of the Enterprise, and the experience and expertise to manage and maintain the Enterprise and Property in conformance with the Tribal custom and tradition as set forth in this Agreement, without becoming involved in any other form [sic] of economic development or any other aspect of Tribal business or Tribal affairs;

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, the parties agree as follows:

XI. RESOLUTION OF DISPUTES

In the event any controversy or claim arising out of this Agreement cannot be settled by the parties hereto, such controversy or claim [sic] shall be settled by binding arbitration in accordance with the then current rules of the American Arbitration Association.

Owner hereby waives its sovereign immunity from suit with respect to any disputes arising under this Agreement, but only to the extent of all real and personal property purchased pursuant to this Agreement, and Owner further agrees that judgment upon any arbitration award may be entered in any court having jurisdiction thereof, and that such court's judgment may result in any executable lien being placed on any such Property. Any

Monetary judgment or award may be satisfied only out of such property and/or out of Owner's share of any future NOP under this Agreement. S & S, Inc. agrees that judgment upon any arbitration award may be entered in any court of competent jurisdiction and that such court's judgment shall be collectible in the manner provided by applicable law.

S & S, Inc. and Owner agree that this Agreement will remain in full force and effect throughout any such binding arbitration or court proceeding(s) and, further, that this Agreement shall continue in effect for so long as it is required for S & S, Inc. to satisfy such judgment, if any, in addition to any other amounts due and payable under this Agreement, out of NOP.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement the dan [sic] year first above written at Macy, Nebraska.

OWNER:

By: //Signature//
Doran L. Morris, Sr., Chairman
Omaha Tribe of Nebraska

S & S, Inc.:

By: //Signature//
John L. Walters, Chairman

RECEIPT AND APPROVAL:

//Signature//
Office of the Secretary of the Interior
Bureau of Indian Affairs

Date: //02/12/88

Supreme Court, U.S.
FILED
APR 8 2002
CLERK

No. 01-1149

In The

Supreme Court of the United States

MISSOURI RIVER SERVICES, INC.,

Petitioner,

v.

OMAHA TRIBE OF NEBRASKA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I.

INTRODUCTION

The United States Court of Appeals for the Eighth Circuit reversed the lower court for confirming an arbitration award which contained a remedy in violation of the sovereign immunity of the Omaha Tribe of Nebraska, and exceeded the authority of the arbitrator under 9 U.S.C. § 10(a) of the Federal Arbitration Act. *Missouri River Services, Inc. v. Omaha Tribe of Nebraska*, 267 F.3d 848 (8th Cir. 2001). The original award in favor of Missouri River Services, Inc., ("MRS") in the amount of $6,206,358.00 plus interest against the Omaha Tribe of Nebraska (the "Tribe") was not disturbed. Only that portion of the award which permitted its satisfaction out of the assets of the Tribe's Iowa casino, rather than the defunct Nebraska bingo operation which was the subject of the award, was disturbed.

MRS has now petitioned this Court to grant certiorari on two questions, framed by petitioner as follows:

> "1. Whether a court may vacate an arbitration award which satisfies all criteria set forth in the Federal Arbitration Act but (assertedly) violates extra-statutory requirements imposed by the court?
>
> 2. Whether a federal court to which an arbitration award has been submitted for confirmation may independently determine a question possessing jurisdictional implications where the jurisdictional question is inextricably intertwined with the merits of the case and necessarily was resolved by the arbitrator?"

The petition claims that there is a conflict of authority within the circuits that needs to be resolved by this Court. On the contrary, the Eighth Circuit Court of Appeals applied traditional rules of law recognized by this Court. The asserted errors consist of nothing more than a claim that these rules of law were misapplied, which this Court rarely recognizes as a basis for granting a Petition for a Writ of Certiorari. See Rule 10, *Rules of the Supreme Court of the United States.*

II.

STATEMENT OF THE CASE

This dispute arose out of a motion by MRS to confirm an arbitration award, and a motion by the Tribe to vacate, or in the alternative, modify the award. The heart of the controversy on appeal related to whether the arbitration award exceeded the grant of authority to the arbitrator in the agreement, and also violated the Tribe's sovereign immunity when confirmed. The award provides that it can be enforced out of the assets of a Tribal gaming operation in Iowa, but the arbitrator's authority and the Tribe's waiver of sovereign immunity was specifically limited to satisfaction *only* out of property purchased for the failed Nebraska gaming operation.

This case arose out of an agreement between the Tribe and MRS, dated December 10, 1987, as amended, establishing the terms under which MRS would build and manage a gaming facility on reservation property in

Nebraska.[1] The agreement provided for arbitration of disputes. A dispute developed under the agreement and MRS demanded arbitration.[2]

The arbitrator in this case derived her authority from Paragraph XI of the December 10, 1987 Agreement. The pertinent portion of Paragraph XI entitled "RESOLUTION OF DISPUTES" states:

> "In the event any controversy or claim arising out of this Agreement cannot be settled by the parties hereto, such controversy or claim shall be settled by binding arbitration in accordance with the then current rules of the American Arbitration Association.
>
> Owner [the Tribe] hereby waives its sovereign immunity from suit with respect to any disputes arising under this Agreement, **but only to the extent of all real and personal property purchased pursuant to this Agreement**, and Owner further agrees that judgment upon any arbitration award may be entered in any court having jurisdiction thereof, and that such court's judgment may result in any executable lien being placed on any **such Property. Any**

---

[1] The reservation includes land in both Nebraska and Iowa.

[2] MRS states, as a matter of fact, on pages 7 and 8 of its Petition, that MRS fully performed its Agreement with the Tribe but was expelled from the reservation. While this statement relates to the merits of the dispute before the arbitrator, which was not disturbed by the Eighth Circuit's decision, nevertheless the Tribe does not agree with this characterization of the facts and believes it is at least implicitly refuted by the arbitrator's findings denying MRS' claim for breach of its alleged "exclusive right to conduct gaming operations" on the reservation. See Appendix G, MRS' Petition, p. 51a.

> **monetary judgment or award may be satisfied only out of such property and/or out of Owner's share of any future NOP [Net Operating Profits] under this Agreement."** (Emphasis added)

This clear limitation of the arbitrator's authority was in contrast with the following award by the arbitrator:

> "Find for Claimant in the amount of $6,206,358.00, which includes interest for ten years as described in the December 10, 1987 agreement, net of the Tribe's July 8, 1993 settlement with Mr. Croll adjusted for interest through December 31, 1998. **The award is to be paid from the Enterprise, which includes all gaming operations on the reservation of the Omaha Tribe of Nebraska (the "Property"), including specifically the gaming operations at Onawa, Iowa; or from any other funds the respondent may elect to use."** (Emphasis added)

The clause in the contract between the parties, from which the arbitrator derived her authority, clearly and unambiguously limited the source for satisfying any award to the "real and personal property purchased pursuant to this Agreement . . . ", and any future profits "under this Agreement." An Amendment to Agreement,[3] approved by the Secretary of Interior on February 12, 1988, explicitly limited the "location of the Enterprise" to Thurston County, Nebraska. That paragraph stated in part:

---

[3] See Appendix I to this Brief containing relevant portions of the Amendment to Agreement.

> "The Enterprise will conduct its preliminary gaming activities . . . at the presently existing cultural center presently held in trust by the United States of America for the benefit of the owner . . . **in Thurston County, Nebraska** consisting of 1.25 acres more or less.
>
> Following construction of a permanent facility the Enterprise will conduct its business activities at a location **in Thurston County, Nebraska** to be agreed upon by the parties (the "Real Estate")." (Emphasis added)

In that same Amendment to Agreement, in Article XX captioned "Gaming Activities" the activities are limited to the conduct of "Bingo and Bingo-related activities."

These specific requirements of the location of the Enterprise in Thurston County, Nebraska, conducting bingo and bingo related activities, were in clear contrast with the award of the arbitrator that specifically mandates its satisfaction from Tribal gaming operations in Onawa, Iowa where Class III casino type gambling takes place. Inexplicably, the arbitrator assumed jurisdiction, for purposes of satisfying the award, over property clearly excluded from the purview of the arbitrator's power. The dispute resolution clause in the December 10th Agreement waived the Tribe's sovereign immunity "only to the extent of all real and personal property purchased pursuant to this Agreement. . . . " And it was *that* property from which an award could be satisfied. With the distinct limitation in the Agreement on the location and type of activities in Thurston County, it was an impossibility that any property purchased for the Onawa, Iowa casino was within the authority of the arbitrator.

MRS filed a motion for an order confirming the arbitration award in the United States District Court for the District of Nebraska, and the Tribe filed a motion to vacate the award or, in the alternative, to modify the award. The issues were presented to the District Court whether the arbitrator exceeded her authority and the Tribe's sovereign immunity, by allowing the arbitration award to be enforced against and satisfied out of property devoted to another tribal casino organized under a different contract, in a different state, involving a different class of gaming. The District Court confirmed the award and overruled the motion to vacate or in the alternative to modify.

The case was then appealed to the Eighth Circuit Court of Appeals by the Tribe. The Court of Appeals reversed the decision of the District Court summarizing its holding as follows:

> "In sum, we hold that the district court erred because the Agreement, as approved by the BIA, does not permit satisfaction of a monetary award from profits and proceeds of the Iowa casino. Thus, the judgment in favor of MRS should be strictly limited, as the Agreement provides, to profits of and property purchased for the Nebraska facility."

Missouri River Services, Inc. v. Omaha Tribe of Nebraska, 267 F.3d 848, 855 (8th Cir. 2001).

This decision was based on two independent grounds. First, the Tribe granted a limited waiver of sovereign immunity which allowed the enforcement of the arbitration award only against assets directly involved with the Nebraska contract. Since "waiver of

immunity from suit implicates jurisdictional concerns, a court must satisfy itself that jurisdiction exists." 267 F.3d at 852. The court, after examining the waiver, held on this issue that:

> "As approved, the Agreement unambiguously restricted the 'Location of the Enterprise' to 'Thurston County, Nebraska' and 'Gaming Activities' to 'Bingo and Bingo related activities'. By the express terms of the only enforceable, valid agreement before the court, the Tribe's waiver of immunity was limited to entry of a judgment and execution thereon only as to property or profits from the Nebraska Bingo facility."

267 F.3d at 854.

Second, the Eighth Circuit based its reversal on its conclusion that the arbitrator exceeded the scope of her authority under the Federal Arbitration Act, 9 U.S.C. § 10(a). In reaching this conclusion, the Eighth Circuit stated:

> "[T]he contractual language cannot reasonably be construed to include proceeds generated under a different agreement the Tribe had executed with a different party to conduct Class III gaming in a different state. To the contrary, '[t]he arbitrator's decision does not draw its essence from the contract because it is expressly contrary to the terms of the Agreement.' "

267 F.3d at 855.

III.

REASONS FOR DENYING WRIT

The Eighth Circuit Court of Appeals decided this case upon properly stated rules of law consistent with applicable decisions of the United States Supreme Court, and the decision does not present a direct conflict with the decisions of other Courts of Appeals.

The petition for certiorari essentially cites two reasons for granting certiorari.

First, MRS argues that the Eighth Circuit's decision erroneously ruled that the arbitration award could be vacated based on "extra-statutory grounds" imposed by the court rather than the Federal Arbitration Act, and this decision is in conflict with the decisions of other circuits.

Second, MRS argues that the Eighth Circuit decided a jurisdictional question which was "intertwined" with the merits of the arbitration decision which required the court to defer to the arbitrator's ruling on that issue. This decision MRS claims also conflicts with the decisions of other circuit courts.

It is evident from a careful review of the decision of the Court of Appeals that MRS' assertions in this respect are inaccurate. The Court of Appeals was not in error, and its decision does not pose any direct conflict with the decisions in other circuits.

Extra Statutory Requirements.

In section IA of Petitioner's Argument it claims that the Eighth Circuit did not base its decision on any of the

statutory grounds set forth in 9 U.S.C. § 10(a) of the Federal Arbitration Act. This is inaccurate.

The Eighth Circuit specifically cited 9 U.S.C. § 10(a) as authority. 267 F.3d at 854. That section provides that:

> "(a) In any of the following cases the United States court . . . may make an order vacating the award upon the application of any party to the arbitration –
>
> * * *
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

The Eighth Circuit specifically discussed Article XI of the contract which provided for binding arbitration and said that "[a]ny . . . award may be satisfied only out of" property purchased pursuant to "this Agreement" or any share of the Tribe's-profits "under this Agreement." Very simply, the Court of Appeals held that the arbitrator exceeded her powers because she authorized MRS to satisfy the award out of totally unrelated property subject to a *different* agreement.

In reaching this conclusion, the court cited various rules it had applied in the past defining when an arbitrator exceeds its powers. For example, the Eighth Circuit recognized that an arbitrator may interpret ambiguous language but may not "disregard or modify unambiguous contract provisions." An award will be set aside where it is "completely irrational or evidences a manifest disregard for the law." And, an arbitration award is "irrational

where it fails to draw its essence from the agreement." 267 F.3d at 854-855.

What is critical to recognize here is that the court was examining the arbitrator's abuse of its power based upon Article XI of the contract defining the power of the arbitrator. This decision had nothing to do with the merits of the case, but everything to do with the arbitrator's authority. This is precisely what is intended by 9 U.S.C. § 10(a)(4) when it states that an award can be vacated "[w]here the arbitrators exceeded their powers. . . . " Comparing an arbitrator's exercise of authority, against the contract which grants it, is a recognized judicial function under the decisions of this Court and the Federal Arbitration Act.

A court derives its authority, or jurisdiction, from the applicable legislative body or constitution. An arbitrator, on the other hand, must look to the contract between the parties as the sole source of his or her authority. As one court so aptly stated:

> "[T]he genesis of arbitral authority is the contract, and arbitrators are permitted to decide only those issues that lie within the contractual mandate. By necessary implication, an arbitrator award regarding a matter not within the scope of the governing arbitration clause is one made in excess of authority, and a court is precluded from giving effect to such an award."

Davis v. Chevy Chase Financial Ltd., 667 F.2d 160, 165 (D.C. Cir. 1981), citing as authority for the statement the United States Supreme Court Case of *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

It was the Tribe's contention in the lower court that the contract stated that it was not for the arbitrator to decide what assets could be used to satisfy an award. That was decided by the parties to the contract and placed beyond the arbitrator's authority or jurisdiction in the arbitration clause. Furthermore, this Court recognized in *AT&T Technologies v. Communications Workers of America*, 475 U.S. 643, 648 (1986) that "[u]nless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the Court, not the arbitrator."

It is therefore apparent that the Eighth Circuit decided this case upon the appropriate section of the Federal Arbitration Act, and did so by applying properly stated rules of law. It did not challenge, or disagree with, any contrary decisions from other circuits.

Petitioner persists in this theme by suggesting that the Eighth Circuit's decision was based upon non-statutory, judge-made criteria emanating largely from dicta in this Court's decision in *Wilko v. Swan*, 346 U.S. 427 (1953). *Wilko*, it is argued, was later criticized and then overruled in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) and *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

Petitioners argue that the *Wilko* court used such terms as "manifest disregard of the law" and "draw its essence from the contract" in describing the legal boundaries of an arbitration award. While *Wilko* was overruled by *Rodrigues de Quijas v. Shearson/American Express, Inc., supra.*, it was not overruled for the use of these terms, but rather for holding that arbitration was not an appropriate

forum for deciding claims under the Securities Act of 1933. More importantly, these terms have been used by this Court in cases decided after *Wilko* suggesting that the underlying premise of petitioner's argument, in attempting to demonstrate a conflict between the Eighth Circuit decision and this Court's cases, is flawed. *See, e.g., United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) ("[Y]et his award is legitimate only so long as it draws its essence from the collective bargaining agreement."); *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 41 (1987) ("[T]he arbitrator's decision must draw its essence from the agreement . . . "); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) ("[P]arties [are] bound by arbitrator's decision not in "manifest disregard of the law", citing *Wilko v. Swan* and noting "overruled on other grounds.").

For petitioner to suggest, therefore, that the Eighth Circuit's decision in this case is in direct conflict with the decisions in other circuits is a misguided effort to create a conflict where none exists. The very language which supposedly creates the conflict among circuit courts has been used, not only by the Eighth Circuit in this case, but also by the United States Supreme Court itself.

Jurisdictional Issue Intertwined with the Merits.

Petitioner next argues that the sovereign immunity jurisdictional issue addressed by the Court of Appeals was intertwined with the merits of the arbitration award, and therefore the court should have deferred to the decision of the arbitrator on the merits to resolve this issue. Several cases from various circuits are cited as authority

for this proposition, including the Eighth Circuit decision of *Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990). The *Obsorn* case discussed the obligation of a district court to request an evidentiary hearing if it thinks it lacks subject matter jurisdiction, and rule on that issue. As the court further stated, "[t]he only exception is in instances when the jurisdictional issue is 'so bound up with the merits that a full trial on the merits may be necessary to resolve the issue.' " 918 F.2d at 730.

The first problem with petitioner's argument on this point is that none of the cases it cited dealt with arbitration, and therefore are factually remote to the case before the court. Second, the jurisdictional issue was not in any way "intertwined" with the merits of the case, or the arbitration award. The arbitration clause on its face prohibited making the award applicable to any assets other than those associated with "this Agreement." The arbitrator, for whatever reason, clearly violated that clause when she made the assets of a completely different casino operation, governed by a different agreement, subject to the award.

Furthermore, the Eighth Circuit doubted that the arbitrator even interpreted the arbitration clause on this waiver of immunity issue. As the court stated:

> "Assuming the arbitrator attempted to interpret the scope of the waiver of immunity, which we doubt, we agree with the Tribe that the district court erred in believing it could not disturb her interpretation. Because a waiver of immunity from suit implicates jurisdictional concerns, a court must satisfy itself that jurisdiction exists."

267 F.3d at 852. Obviously, the Eighth Circuit never believed this jurisdictional issue was in any way "intertwined" with the merits. The merits of the case had nothing to do with the arbitration clause, the sovereign immunity jurisdictional issue, or the arbitrator's usurpation of power specifically denied it by the contract.

Again, despite petitioner's strained attempt to create a conflict among the circuits, where none really exists, it is apparent that the Eighth Circuit decided this case upon a correct application of properly stated rules of law.

Sovereign immunity has always been viewed by the courts as a limitation on their jurisdiction, and as a matter for the court to examine and decide on its own. In *United States v. Sherwood*, 312 U.S. 584, 586-87 (1941), the Supreme Court stated that "[t]he United States, as sovereign, is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." Any such consent must be "strictly interpreted." 312 U.S. at 590. As sovereigns, Indian Nations also enjoy immunity "from judicial attack absent consent to be sued." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*, 523 U.S. 751, 757 (1998).

In *United States v. U.S. Fidelity and Guaranty Co.*, 309 U.S. 506 (1940), the Supreme Court held that the Choctaw and Chickasaw Nations, and the United States as their trustee, could not be held liable on a judgment rendered on a cross-claim in state court because there had been no congressional consent. Therefore, the judgment was subject to collateral attack. The Supreme Court stated:

> "Consent alone gives jurisdiction to adjudge a sovereign. Absent that consent, the attempted exercise of judicial power is void."

309 U.S. at 514. Furthermore, the failure to object to the Court's jurisdiction did not constitute a waiver of this immunity because "immunity cannot be waived by officials", otherwise "it would subject the Government to suit in any court in the discretion of its responsible officers." 309 U.S. at 513.

On pages 11 and 18 of its Petition, MRS argues that the Tribe had stipulated that the arbitrator had the authority to decide the Tribe's waiver of sovereign immunity. The Tribe disputes this suggestion. The stipulation, Appendix H to the Petition, does not specifically identify that as an issue subject to arbitration. Furthermore, the Eighth Circuit, citing this Court's decision in the *United States v. U.S. Fidelity and Guaranty Co.*, stated that "the Tribe's attorney could not expand the scope of the Tribe's waiver from suit in the pre-hearing submission to the arbitrator." 267 F.3d at 852.

What MRS is really arguing is that the parties agreed that the arbitrator should decide the issue of the Tribe's scope of its waiver of sovereign immunity in the Arbitration Clause. This is an issue of who properly decides an arbitrator's scope of authority – the arbitrator or the court. This Court has held that the scope of an arbitrator's power to decide an issue, or arbitrability of an issue, is subject to independent review by the courts. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). This Court further admonished that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that

they did so." 514 U.S. at 944. Not only did the Tribe's attorney not have the authority to expand by stipulation the arbitration clause's delegation of power to the arbitrator, but there is no "clear and unmistakable" evidence that the parties agreed to do so.

IV.

CONCLUSION

It is evident from a review of the Eighth Circuit's decision in this case that it followed well established principles of law rendered by this Court. There is no conflict among the circuits, represented by this case, that calls for a resolution by this Court. The case is simply one in which an arbitrator exceeded her authority under the arbitration clause in granting a remedy, and in the process violated the sovereign immunity of the Omaha Tribe of Nebraska. The Eighth Circuit reviewed the case on very narrow and traditional grounds, and prevented what would have otherwise been a clear injustice to the Tribe.

The arbitrator's decision on the merits was not disturbed. The court merely limited the applicability of the award, and its satisfaction, to assets within the limits of the Tribe's waiver of sovereign immunity.

The Eighth Circuit based its decision on two independent grounds, the arbitrator's violation of its authority and a violation of the Tribe's sovereign immunity. Either basis alone is sufficient to sustain the Court's decision.

We therefore respectfully request that the Court deny the Petition for Certiorari.

Dated this 8th day of April, 2002.

OMAHA TRIBE OF NEBRASKA, a federally recognized Indian Tribe, Respondent

LYMAN L. LARSEN, #12398
STINSON, MAG & FIZZELL, P.C.
1299 Farnam St.
Omaha, NE 68102

APPENDIX I

AMENDMENT TO AGREEMENT

This Amendment to the Agreement dated December 10, 1987 (the "Amendment") is made on the date set forth opposite the signature of the parties, by and between the Omaha Tribe of Nebraska (hereinafter referred to as the "Owner"), which is a federally-recognized Indian Tribe organized pursuant to the Indian Reorganization Act of June 18, 1934 (25 U.S.C. §476) and Missouri River Services, Inc., a Delaware corporation f/k/a Streicher & Stearns, Inc. a Delaware corporation (hereinafter referred to as "MRS").

RECITALS

WHEREAS, the owner is a federally-recognized Indian Tribe and

WHEREAS, Streicher & Stearns, Inc. has changed its name to Missouri River Services, Inc.; and

WHEREAS, the Owner and MRS entered into an Agreement dated December 10, 1987 whereby MRS was retained by the Owner to finance, establish, operate, and manage property owned by the Owner (the "Enterprise") and to conduct, manage, and operate Bingo and other gaming activities of the Enterprises on behalf of the Owner; and

WHEREAS, the Department of Interior, Bureau of Indian Affairs, has requested that the parties make certain changes to the Agreement to comply with a memorandum from Under-Secretary Ross Swimmer dated

April 7, 1986 prior to the time that it will issue its approval of the Agreement, and

WHEREAS, the parties wish to amend and modify the agreement to comply with the April 7, 1986 memorandum from Under-Secretary Swimmer.

NOW, THEREFORE, in consideration of mutual promises and covenants contained herein, the parties agree to amend the Agreement as follows:

WITNESSETH

* * *

3. The Agreement does not currently specify the location where the Enterprise will conduct its activities. Accordingly, the Agreement should be, and is hereby amended by inserting the following language at the end thereof:

XIX. LOCATION OF THE ENTERPRISE

The Enterprise will conduct its Preliminary Gaming Activities, as that term is defined in the Supplemental Agreement of December 10, 1987, at the presently existing Cultural Center presently held in trust by the United States of America for the benefit of the Owner and legally described as follows:

S[illegible] of the NE[illegible] of the SE[illegible] of the NW[illegible] Section 25 Township 25 Range 9 in Thurston County, Nebraska consisting of 1.25 acres more or less.

Following construction of a permanent facility the Enterprise will conduct its business activities at a location in Thurston County,

Nebraska to be agreed upon by the parties (the "Real Estate").

In the event that the Real Estate is owned by a third party MRS will purchase the Real Estate, and for the sum of One Dollar ($1.00), convey the Real Estate to the Owner whereupon the Owner shall place the Real Estate in trust with the United States of America for the benefit of the Owner. The cost of acquisition of the Real Estate shall be deemed a capital investment and repaid to MRS in the manner set forth in Article II(A). The parties acknowledge and agree that notwithstanding anything in this Agreement to the contrary, the Owner is not required to obtain, or provide, the Real Estate to MRS, but, instead, MRS will secure the same at its sole cost and expense, which cost and expense shall be repaid to MRS pursuant to the terms of Article II(A).

4. The Agreement should be, and is hereby amended by inserting the following language at the end thereof:

Article XX, Gaming Activities

The Enterprise shall conduct Bingo and Bingo-related activities.

5. This Amendment is intended to be construed in accordance with the terms of the Agreement. In the event that there is any conflict between this Amendment and the Agreement, the terms of the prior shall govern the terms of the latter to the extent of any such inconsistency.

IN WITNESS WHEREOF, the parties hereto have executed this Amendment at the place, and upon the day and year set forth opposite their respective signatures.

"OWNER"

Executed this 2nd day of February, 1988 at Macy, Nebraska

By: /s/ [Illegible]
Its: Chairman, Omaha Tribe Nebraska

"MRS"

By: /s/ [Illegible]
Its: Secretary/Treasurer

Executed this 4th day of February, 1988 at Barrington, Illinois

RECEIVED AND APPROVED:

/s/ [Illegible]
Office of the Secretary of Interior/Bureau of Indian Affairs

Date 2/12/88

Supreme Court, U.S.
FILED
APR 23 2002
OFFICE OF THE CLERK

(3)

No. 01-1149

In The

Supreme Court of the United States

MISSOURI RIVER SERVICES, INC.,
a Delaware corporation,

Petitioner,

v.

OMAHA TRIBE OF NEBRASKA,
a federally recognized Indian Tribe,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Missouri River Services, Inc. ("MRS") hereby submits the following Reply Brief in Support of Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

This Court should issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit") for the following reasons.

First, this case presents important issues concerning the application and effect of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"). The FAA establishes a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital v. Mercury Const. Co.*, 460 U.S. 1, 24 (1983); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). One of the most important questions that can arise under the FAA is the standard of review to be applied to an arbitration award – the precise subject presented by this Petition. Respondent, the Omaha Tribe of Nebraska ("Tribe"), does not deny that this issue merits the Court's attention.

Second, this case poses questions of first impression for this Court.[1] This lack of resolution is reflected in the profound circuit split identified in MRS' Petition for Writ of Certiorari. Once again, the Tribe does not even dispute

[1] The Court has addressed the questions presented in MRS' Petition for Writ of Certiorari only in dicta.

the existence of this circuit split or the need to bring order to this area of the law.

Third, this case provides a pristine factual background for the questions presented. The Tribe does not ever argue that this case may turn on a narrow factual issue, or that some obscure point in the record may prevent the Court from reaching these questions. As a result, this case offers the Court a promising vehicle for addressing the broad legal issues raised herein.

The Tribe's primary contention is that MRS misconstrued the Eighth Circuit's opinion. The Court readily can identify the errors in this claim by examining this opinion.

ARGUMENT

A. This Court Should Grant This Petition Because The Eighth Circuit Erroneously Ruled That A Court May Vacate An Arbitration Award Which Satisfies All Criteria Set Forth In The FAA But (Assertedly) Violates Extra-Statutory Requirements Imposed By The Court, And This Ruling Conflicts With The Decisions Of Other Circuits

The Tribe insists that the Eighth Circuit did not apply extra-statutory criteria in striking down the arbitration award. According to the Tribe, the Eighth Circuit's decision "had nothing to do with the merits of the case, but everything to do with the arbitrator's authority." Brief in Opposition at 9. This view is inaccurate.

The Eighth Circuit did not focus on whether the arbitrator was asked to decide the issues before her. This point was not open to serious question. Indeed, in an earlier phase of the case, the Tribe stipulated that each claim filed in the arbitration proceeding was subject to arbitration (App. at 58-60). The District Court entered an Order encapsulating this stipulation (App. at 47-48), and the Tribe did not appeal this Order.

Rather, the Eighth Circuit's inquiry focused on whether the arbitrator's decision was correct. The Eighth Circuit had access only to a "cold" record. As a result, the court was not well positioned to second-guess the arbitrator's decision. Relying on this record and its own views of the case, the Eighth Circuit determined that the arbitrator had erred.

The Eighth Circuit expressly based this decision upon non-statutory grounds. The Eighth Circuit first noted that the FAA provides for vacation of an arbitration award if the arbitrator exceeds the scope of his or her authority. *Missouri River Services, Inc. v. Omaha Tribe of Nebraska*, 267 F.3d 848, 854 (8th Cir. 2001) (App. at 12). The Eighth Circuit then stated that "in addition to" this statutory criterium, an award may be set aside based upon non-statutory grounds. *Id.* at 854 (App. at 12). The Eighth Circuit concluded that MRS' arbitration award violated these judge-made criteria. *Id.* at 855 (App. at 12) ("we find that the award failed to draw its essence from the agreement").

The Tribe later suggests that even though the Eighth Circuit did apply non-statutory criteria, its decision still did not conflict with the decisions of other circuits. Brief

in Opposition at 11-12. According to the Tribe, "[t]he very language which supposedly creates the conflict among circuit courts has been used, not only by the Eighth Circuit in this case, but also by the United States Supreme Court itself." *Id.* at 12. This may be so. The fact remains, however, that the case law of Second, Fifth, Seventh, and Ninth Circuits expressly holds that an arbitration award may be vacated only upon the grounds set forth in the FAA, while other circuits hold otherwise. The Tribe does not even deny the existence of this disagreement.

Moreover, the Tribe's assertion that this Court already has ruled that the lower courts may strike down arbitration awards based upon non-statutory criteria is erroneous. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), concerned labor arbitration. This case did not apply or construe the FAA. Further, this decision, which is over 40 years old, may not reflect the modern view of arbitration. *See* Petition for a Writ of Certiorari at 21-23 for a discussion of changing judicial perspectives on arbitration.

The second case cited by the Tribe, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), was decided under the FAA. The issue in that case, however, was whether the court or the arbitrator should decide the question of arbitrability. *Id.* at 942. Any discussion concerning the application of extra-statutory criteria to arbitration awards set forth in the Court's opinion was dicta.

The fact is that this Court never has resolved the question raised by this Petition. This lack of resolution is reflected in the disarray of the lower courts' decisions. This Petition offers the Court an opportunity to settle this

important question. MRS respectfully submits that the Court should accept this opportunity.

B. This Court Should Grant This Petition Because The Eighth Circuit Erroneously Ruled That Where A Question Possessing Jurisdictional Implications Is Intertwined With The Merits Of An Arbitration Decision, The Federal Courts Not Only May But Must Disregard This Decision

The second issue in this case is whether a Federal Court to which an arbitration award is submitted for confirmation may independently determine a question possessing jurisdictional implications where the jurisdictional question is inextricably intertwined with the merits of the case and necessarily was resolved by the arbitrator. The Tribe presents a scattering of arguments for the position that the Court should not grant certiorari on this issue. None is persuasive.

The Tribe states that "[t]he first problem with petitioner's argument on this point is that none of the cases it cited dealt with arbitration, and therefore are factually remote to the case before the court." Brief in Opposition at 13. This point is not novel. MRS conceded in its Petition that this factual distinction between the cases exists. Petition for Writ of Certiorari at 27. This fact, however, does not mean that the Court should reject this case. The cases cited by MRS are closely analogous to the instant case. These cases strongly support MRS's argument. In light of the established federal policy favoring the enforcement of arbitration agreement, this Court should establish that the same rule applies in the instant case.

The Tribe further asserts that "the jurisdictional issue was not in any way 'intertwined' with the merits of the case, or the arbitration award." Brief in Opposition at 13. This puzzling assertion is not supported by the facts. The jurisdictional question identified by the Eighth Circuit may be stated as follows: whether the Tribe's waiver of its tribal sovereign immunity was broad enough to permit the relief awarded by the arbitrator. *Missouri River Services, Inc. v. Omaha Tribe of Nebraska*, 267 F.3d 848, 852-854 (8th Cir. 2001) (App. at 6-11). The arbitrator necessarily resolved this issue when she issued her award.[2] As a result, the jurisdictional question not only was "intertwined" with the merits, but it was identical to the case decided on the merits.

The Tribe next avers that "[s]overeign immunity has always been viewed by the courts as a limitation on their jurisdiction, and as a matter for the court to examine and decide on its own." Brief in Opposition at 14. The first half of this statement undeniably is true; sovereign immunity is a jurisdictional issue. The latter allegation, however, is erroneous. In cases where a jurisdictional issue is intertwined with the merits, the proper approach is to assume jurisdiction exists and deal with the objection as an attack on the merits of the plaintiff's case. *See* Petition for Writ of Certiorari at 24-25 and cases cited therein. The Tribe's unsupported assertion that parties may ask a court to intrude on the responsibilities of the finder of fact by challenging federal jurisdiction does

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[2] The arbitrator could not have awarded the relief she selected without first determining that this relief was not contemplated by the Tribe's waiver of its immunity.

nothing to impair the case for certiorari in this proceeding.

The Tribe finally maintains that the real issue in this case is whether the court or the arbitrator should decide whether a question is arbitrable. Brief in Opposition at 15-16. This assertion is erroneous. As set forth above in this memorandum, the parties stipulated that each claim filed in the arbitration proceeding was subject to arbitration. (App. at 58-60). The District Court entered an Order incorporating this stipulation (App. at 47-48), and the Tribe did not appeal this Order.[3] Thus, the question of arbitrability was not before the Eighth Circuit, and is not at issue in this Petition.

C. Intervention By This Court Is Imperative

The ultimate question in this case is whether the federal policy favoring arbitration is to be maintained. As set forth above in this memorandum, the FAA establishes a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital v. Mercury Const. Co.*, 460 U.S. 1, 24 (1983); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). The "unmistakably clear" purpose of the FAA is to ensure that arbitration, when selected by the parties to a contract, be "speedy and not subject to delay or obstruction in the courts." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395,

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[3] Even if the Tribe had attempted to appeal this Order, this appeal would not have been effective. *Swift & Co. v. United States*, 276 U.S. 311, 324 (1928) ("a decree that appears to have been entered by consent, is always affirmed, without considering the merits of the case.").

404 (1967). The Court regularly has accepted arbitration cases in recent years where necessary to effectuate this policy.

The determination of the standard of review to be applied to an arbitration award is critical to the achievement of this policy objective. Further, the deep split between the circuits makes it apparent that the lower courts are not likely to resolve this issue without leadership from this Court. MRS accordingly, and respectfully, suggests that intervention on the part of the Court is imperative.

CONCLUSION

For the foregoing reasons, this Court should grant MRS' Petition for a Writ of Certiorari.

Dated this 19th day of April, 2002.

Respectfully submitted,

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